SUPREME COURT, U. S.
NOV 1967
JOHN F. DAVIS, CLERK

No. 149

IN THE

Supreme Court of the United States

October Term, 1967

WAYNE DYKE, ED MCKINNEY AND JOHN BLACKWELL,
Petitioners

v.

TAYLOR IMPLEMENT MANUFACTURING COMPANY, INC.,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

JOINT APPENDIX

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CONSENT DECREE

Filed and entered January 24, 1966

No. 8165 In the Chancery Court for McMinn County, Tennesse, At Athens

TAYLOR IMPLEMENT MANUFACTURING COMPANY, INC.

A Tennessee corporation having its principal office and place of business in the City of Athens, County of McMinn, State of Tennessee,

Complainant

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO

A labor organization carrying on its activities in the State of Tennessee, JOHN BROOME, Individually and as Staff Representative of said International Union, ANDY HEATON, Individually and Employee and Agent of said International Union, WAYNE DYKE, KENNETH KYLE, JAMES (BUDDY) CRANFIELD, ED McKINNEY, JOHN SCOTT, WAYNE REESE, ALTON WATSON, JOE BRANNON, SHERMAN GREEN, BILL JACKSON, MARTIN BOWLIN, JR., Individually and as Agents of the Union, and all other members of said Union and all persons whomsoever allied and acting in concert with them for a common purpose.

Defendants

This cause came on to be heard this 24th day of January, 1966, before the Honorable G. W. Woodlee, Chancellor, upon good cause shown and upon agreement of the parties. The defendants, and each of them, are permanently enjoined from:

(a) Engaging in mass picketing and mass assemblage of pickets and/or others and having more than three (3) per-

sons within 250 feet of Complainant's property line at any one time; the said three (3) allowable persons may maintain their position at the Company's property line in the beginning of the paved portion of the access road, and all other defendants are prohibited from congregating or massing on any of the paved right-of-way but are permitted to gather at the location on which the present school but sits.

(b) From using language or gestures against any employee, customer or visitor of the Complainant, or any other person, which is calculated to have the effect of arousing fear or bodily harm or property damage or of otherwise breaching the peace;

(c) From inflicting harm or damage upon the persons or property of Complainant's employees, customers, visitors or any other persons. This includes but is not limited to the throwing of tacks or other sharp objects on the roadway or driveway;

(d) From interfering in any way with free ingress or egress to and from Complainant's property by employees, customers, visitors, or invitees of Complainant;

(e) From building and/or maintaining a fire within 250 feet of Complainant's property line, except that it is allowed to the above three (3) pickets a fire barrel which shall be set out of the roadway and so as not to interfere with the flow of traffic.

(Signed) *G. W. Woodlee, Chancellor*

PETITION FOR ATTACHMENT FOR CONTEMPT

* * *

The complainant, Taylor Implement Manufacturing Company, Inc., the original complainant herein, respectfully shows to the Court:

* * *

"On or about February 25, 1966, at approximately 11:00 p.m. while Lloyd Duckett, nonstriking employee of the complainant, was at his home located in Monroe County, Tennessee, along with four members of his family, an automobile drove to his premises from which a shot was fired into his home. Thereupon the fleeing car in question was pursued, identified, and caught. It was found that the three occupants of the car were John Blackwell and the defendants Wayne Dyke and Ed McKinney, all three of whom are striking employees of the complainant and members of the defendant Union. The said Wayne Dyke is the elected president of the local group of the defendant Union. A rifle of the type which fires a projectile of the sort found at the Duckett Home was discovered in the car at the time of the apprehension and arrest of the said three striking employees."

DECREE

* * *

The defendants, with the exception of the United Steelworkers of America, AFL-CIO, being in Court under arrest on the attachment heretofore issued against each of them, and the Court having set the hearing for the defendants, Wayne Dyke, Ed McKinney, and John Blackwell, only, for the allegations set forth in count IV of said petition, with a hearing for the remaining defendants on the remaining counts of the petition to be set at a later date.

The Court having considered the said petition, the answers of the defendants, Wayne Dyke, Ed McKinney, and John Blackwell, and having heard the oral testimony of the complainant and its witnesses in open court, and having further considered the announcement by the solicitors for the defendants that they would offer no proof, and the entire records, the Court is of the opinion that the defendants, Wayne Dyke, Ed McKinney, and John Blackwell, are in contempt of Court.

* * *

It is therefore ORDERED, ADJUDGED, and DECREED by the Court that the defendants, Wayne Dyke, Ed McKinney, and John Blackwell, and each of them be fined the sum of Fifty Dollars ($50.00) and that each of them be committed to the jail of McMinn County, Tennessee, and there to remain for a period of ten (10) days.

The defendants have twenty (20) days from the entry of this order to file a motion for a new trial.

(Signed) *G. W. Woodlee, Chancellor*

TRANSCRIPT OF CONTEMPT TRIAL

Athens, Tennessee
March 22, 1966

BE IT REMEMBERED, the above-entitled cause came on for hearing on this date before the Honorable Glenn W. Woodlee, Chancellor, when all parties announced ready for trial.

WHEREUPON, the following proceedings were had and evidence introduced, to-wit:

* * *

THE COURT: And you charge that these three men, or some one of them, fired into the home of this gentleman?

MR. AYRES: Yes sir, Your Honor, and that the car fled from Monroe County and was apprehended in McMinn County with a rifle of the type that fires a projectile of the sort found at the Duckett home was found in the car in which the three men were riding.

THE COURT: What is your defense?

MR. TAYLOR: Our defense is that we didn't do it.

THE COURT: Not guilty?

MR. TAYLOR: Not guilty.

* * *

MARVIN HAMPTON,

being first duly sworn, was examined and testified as follows:

* * *

Q. Mr. Hampton, I will take you back to the night of February 25, 1966, and ask you where you were on this night?

A. I was at Arnold Phillips' home.

Q. Where?

A. Arnold Phillips.

* * *

Q. Arnold Phillips' home. Who is Arnold Phillips, Mr. Hampton?

A. He is my father-in-law.

Q. Where does he work?

A. Taylor Implement.

Q. How far is his home located from the home of Lloyd Duckett?

A. I would say three to four hundred yards.

Q. Can you see the home of Lloyd Duckett from the Arnold Phillips' home?

A. Yes, you can.

* * *

A. At eleven o'clock I was sitting in Arnold Phillips' living room and there was a car come in sight and I sat there and watched it as it passed Arnold's Home. It was very normal and——

THE COURT: (Interposing) Very what?

A. Very normal. The car was very normal when it passed.

* * *

Q. (By Mr. Carter) What is the lighting condition there at the Arnold Phillips' home?

A. Would you repeat that?

Q. Well, what kind of lights do they have there so you can see the road, if any?

A. Well, they had two floodlights in the front yard.

Q. Could you see the road clearly from this—where you were sitting?

* * *

A. Yes sir.

Q. What color car was the car that passed?

A. It was a white top with a dark bottom.

Q. What kind of an automobile was it?

A. It was a Dodge.

Q. A Dodge automobile?

A. Yes.

Q. Could you give the approximate year of the automobile?

A. I would say it was a sixty to a sixty-one.

Q. Immediately after the automobile passed the Arnold Phillips' home would you tell the Court in your own words what happened?

A. Well, just after they passed the house I heard the motor grab several times and then just—just a second I heard guns fire.

* * *

CROSS EXAMINATION

BY MR. TAYLOR:

Q. Mr. Hampton, you didn't see these boys that night at all, did you?

A. No sir, I couldn't swear that I seen them.

Q. You can't swear that you saw these boys. As a matter of fact you can't swear where these boys were that night, can you?

A. No sir.

Q. And you can't swear as to what—whose car it was, can you?

A. No sir.

Q. As far as you know, you don't know anything at all about it, do you? Is that right? You don't know who shot in the house?

A. No sir.

* * *

WITNESS EXCUSED.

MR. LONGSHORE: Excuse me for interrupting, but this matter of a jury trial. I would like to have it put in the record that the defendants demanded a jury trial——

THE COURT: (Interposing) Let the record show that demand was made for a jury and denied.

LILLIAN HARRIS,

being first duly sworn, was examined and testified as follows:

* * *

Q. What relationship, if any, is Lloyd Duckett to you?

A: My father.

Q. Mrs. Harris, on the night of February 25, 1966, I will ask you where you were?

A. In the living room of my father's home.

Q. And in what county is that located in?

A. Monroe.

* * *

Q. Would you relate to the Court, Mrs. Harris, what happened on this occasion, if anything, and at approximately what time?

A. Around eleven o'clock why this car came up the road.

* * *

Q. Did you see the car to begin with?

A. I saw the headlights.

Q. You saw the headlights——

A. (Interposing) Yes.

Q. (Continuing) of the automobile?

A. Yes.

Q. All right, go ahead.

A. And it came on up the road to the mail boxes and it began slowing up, and then it came on up just a few more feet and there was a gun fired.

Q. Was that from the automobile toward the home where you were in?

A. Yes. It was fired from the automobile.

Q. Where were you standing at that time?

A. In the living room.

Q. Standing in the living room. Could you see out the door?

A. Yes, I could.

Q. Did you see the automobile?

A. Yes.

Q. What is the lighting condition, if any, at the home where you live?

A. It's very good. You can tell—You can distinguish light from dark.

Q. Well, do you have floodlights there or anything?

A. Yes.

* * *

Q. Do you recall the general character of the car, the color or anything like that?

A. No, I couldn't. I was too frightened.

Q. Did you see the automobile leave that area?

A. Yes, I did.

Q. What, if anything, happened to that automobile?

A. Would you repeat that?

Q. What, if anything—Were shots fired? What, if anything, happened as the automobile was going on up the hill?

A. Well, there was a shot fired into it.

Q. Did you see—How do you know there was a shot fired into it, I will ask you?

A. I saw the fire fly off of it.

Q. Off the car?

A. Off the back of the car.

Q. All right. Was the automobile going away from your home at the time?

A. Yes.

* * *

Q. . . . . Now, of course, you don't know who—You don't know whose car this was?

A. Just all I've heard.

Q. And you don't know these boys? Didn't see them up there that night, did you?

A. No sir.

Q. And is that about all you know about it? What you've stated here is all you know about it?

* * *

A. Yes.

THE COURT: Young lady, you said there was a shot fired into this car that was moving along the road there. Do you know who shot that—who fired that shot?

THE WITNESS: Yes.

THE COURT: Who was it?

THE WITNESS: My brother-in-law.

THE COURT: Where was he?

THE WITNESS: He was in the yard—at my father's home.

* * *

DALE HARRIS

being first duly sworn, was examined and testified as follows:

* * *

Q. Who is your father-in-law?

A. Lloyd Duckett.

Q. Where does Mr. Duckett work?

A. Taylor Implement Company.

Q. On the night of February 25, 1966, Mr. Harris, where were you?

A. I was at my father-in-law's in the living room.

* * *

Q. All right. When you went outside did you see an automobile approaching?

A. Yes sir, I did.

Q. Was it coming from—What direction?

A. It was coming up the road I would say it was east. I mean west East——

Q. (Interposing) Well, was it coming from the direction of Arnold Phillips' home?

A. Yes Arnold Phillips.

Q. Was it coming uphill?

A. Uphill; yes.

Q. And what, if anything did the occupants of that automobile do when it got to the place or point of Lloyd Duckett's home?

A. Well, when it got to his mail boxes it began to slow down a little bit and got on up in front of his house which was only about twenty feet—twenty-five feet—why it got slower all the time it was coming up through there and then they was a shot fired and we—I heard it hit the house.

Q. All right. Could you see the automobile at that time?

A. Yes sir, I could.

Q. Do you know what kind of automobile that automobile was?

A. It was a '60 or '61 Dodge Pioneer.

Q. Are you familiar with cars?

A. Yes sir.

Q. And is that sort of a hobby of yours of some sort?

A. I've just always been able to tell most cars.

Q. And you could see this automobile on this night?

A. Yes sir, I could.

Q. Have you seen that automobile since that time?

A. Yes sir.

Q. Where did you see that automobile?

A. We was brought to McMinn County Jail to identify it that night.

Q. And who brought you down here?

A. Sheriff Kirkpatrick.

Q. And did you identify it at that time?

MR. TAYLOR: We except to the identification.

Q. (By Mr. Carter) Well, did you see the same car—

THE COURT: (Interposing) He asked if he identified it.

A. (By the witness) Yes. It was the same car.

Q. What, if anything, after you went out in the yard, what, if anything, did you or your brother-in-law do? What did you do concerning this automobile after it shot?

A. Immediately after it shot my brother-in-law was, he was in front of me and he just—He was on his knees and he fired a shot within a couple or three seconds at the car and I seen the fire fly from the trunk lit.

Q. From the trunk of the car?

A. Somewhere around the trunk lid. It was in the back of the car.

Q. Could you tell how many people were in that car?

A. No sir. They was quite a few people. I couldn't tell.

Q. Now then, immediately thereafter what did you do concerning the notification of authorities, if anything?

A. We went to a neighbor's home half a mile, could be three-quarters of a mile, and called the Monroe County Sheriff's Department.

* * *

Q. And, of course, you don't know who they were?

A. No, I never seen them before.

Q. Never seen them before?
A. No.
Q. That's all you know about it?
A. Yes sir.

ROBERT WAYNE ELLIS,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CARTER:

Q. What is your name?
A. Robert Wayne Ellis.
Q. Speak up, Mr. Ellis, so the attorneys for the defendants in this case can hear you, also the Court. Where do you work?

* * *

A. I am a mechanic at Madisonville Motors.
Q. Are you related in any way to Mr. Lloyd Duckett?
A. Yes. He's my father-in-law.
Q. You married his daughter?
A. Yes.
Q. I will ask you to relate to the Court, Mr. Ellis, where you were on the night of February 25, 1966?
A. I was at my father-in-law's house.
Q. At approximately eleven o'clock who was still awake?
A. It was me, my sister-in-law, and her husband.
Q. And who is that?
A. Dale Harris and Lillian Harris.
Q. Lillian Harris?
A. Yes.
Q. Would you relate to the Court just what happened on that evening—at that time?
A. Well, about eleven my sister in law seen the lights on the car coming, so me and Mr. Harris went outside, and

as the car approached it just slowed up and shot fired and we returned fire.

Q. I will ask you what, if anything, happened earlier in the evening on this same night?

A. Yes. About eight o'clock they was a '57 Ford, black——

Q. (Interposing) Did you see this car?

A. Yes.

Q. All right. Go ahead.

A. It pulled up just about exactly in the same spot where the——

MR. TAYLOR: (Interposing) We except to something about some other car at some other time.

THE COURT: Overule.

Q. (By Mr. Carter) Go ahead.

A. It stopped at about exactly—the exact spot where the shot was fired from the other automobile. It set there about a minute or a minute and a half and backed up and went back, back down the road toward Phillips's.

Q. Did this arouse your suspicion or anything?

MR. TAYLOR: We except to arousing his suspicion.

THE COURT: Well, yes, I think——

MR. TAYLOR: (Interposing) I withdraw that.

THE COURT: It wouldn't help us too much.

Q. (By Mr. Carter) In any event, when you returned the fire, Mr. Ellis, did you hit the automobile that speeded away?

A. Yes sir.

Q. Where, if you have any idea, did you hit this automobile?

A. I knowed I hit it in the back. In the back of the car.

Q. How do you know you did? How do you know you hit it?

A. Well, that's where I aimed.

Q. Did you see any fire or anything like that fly from the car?

A. No sir.

Q. Did you hit the back of it in a high place or a low place——

MR. TAYLOR: (Interposing) Let him tell where he hit it.

THE COURT: He is asking him.

MR. CARTER: Just give me time. Give me time to ask the question.

A. (By the witness) Well, all I shot for was the back of the car.

Q. Did you see that car at a later time? Where did you see the car?

MR. LONGSHORE: We object to that. Well, I withdraw my objection.

Q. (By Mr. Carter) Where did you see the car?

A. Seen it at the Jail.

Q. What Jail was that?

A. Athens.

THE COURT: Let's back up a minute. What kind of a car was it? If you know?

THE WITNESS: Well, I knew it was a '60 or '61 Dodge and I knew it was a light colored top.

THE COURT: You saw it well enough——

THE WITNESS: (Interposing) Yes sir.

THE COURT: (Continuing) to know it was a Dodge automobile?

THE WITNESS: Yes sir. I've worked on enough of them.

THE COURT: Are you a mechanic?

THE WITNESS: Yes sir.

THE COURT: Garage man or automobile mechanic?

THE WITNESS: Automobile mechanic.

THE COURT: And it was either a '60 or '61 Dodge?

THE WITNESS: Yes sir.

THE COURT: And you're positive you could recognize that car as it drove up and approached your father-in-law's house?

THE WITNESS: Yes sir.

THE COURT: Did you fire more than one shot?

THE WITNESS: Yes sir. Approximately about three. Three or four. I'm not sure.

THE COURT: Could you tell whether you hit the car?

THE WITNESS: Well I knew I hit it the first shot.

THE COURT: Well, how did you know it?

THE WITNESS: I'm just not that bad of a shot.

THE COURT: Anything further?

Q. (By Mr. Carter) Who was with you on this occasion when the shots were fired?

A. Dale Harris.

Q. Dale Harris. And you— Did you come to McMinn County Jail?

A. Yes sir.

Q. And did you see the automobile that was there that night? Did you inspect the automobile in any way?

A. Yes.

Q. What did you find there——

A. (Interposing) Well, I found a bullet hole.

THE COURT: First of all, was it the same car?

THE WITNESS: Yes. I would say it was.

THE COURT: What did you find?

THE WITNESS: Well, first, of course, I found the bullet hole.

Q. (My Mr. Carter) Where was the bullet hole, Mr. Ellis?

A. In the back of the trunk lid.

Q. Who did you come to the McMinn County Jail with?

A. Howard Kirkpatrick, Sheriff of Monroe County.

Q. And did you return to Monroe County with him?

A. Yes sir.

Q. What, if anything, happened in the Monroe County Jail early the next morning, in the morning hours, that you remember, if anything, Mr. Ellis?

A. Well, I heard some talk that——

Q. (Interposing) Who was doing the talking?

A. McKinley. McKinley or McKinney.

Q. Do you recognize him?

A. Yes sir.

Q. Which one is he?

A. That one (indicating). The one on this end.

Q. All right. What, if anything, did he say there in your presence?

MR. LONGSHORE: We object to that, Your Honor, it is outside the allegations of the petition.

THE COURT: I overrule.

A. (Witness continuing) Heard him talking to a boy. He was the guy in the wrecker that pulled the car to Monroe County, the boy was.

Q. What did he say?

A. I heard him say we had our backs to him and heard him say he was fixing to leave that car.

Q. He said he was fixing to leave the car?

A. Yes sir.

MR. CARTER: I think you may ask.

THE COURT: Now you say that Ed McKinney said what?

THE WITNESS: Said that he was fixing to leave the car. The way I understood it was that he was just scared to death.

MR. TAYLOR: We except to that.

THE COURT: Well, yes. I sustain. You may have understood but I was just trying to get exactly what he heard him say.

THE WITNESS: I heard him say that he was fixing to leave the car. I was not the only one that heard it.

Q. (By Mr. Carter) I ask you, Mr. Ellis, if you can identify that photograph?

A. Yes sir.

Q. What is that photograph? What does it represent?

A. That's the car that I fired into the back of.

Q. Is there a bullet hole or anything like that which is in the automobile?

A. Yes sir.

Q. Will you introduce that as an exhibit to your testimony?

A. Yes sir.

THE COURT: Let the counsel see the exhibit. (Passing photograph to counsel for defendants.) Any objections to this exhibit?

MR. TAYLOR: No sir.

THE COURT: Let the reporter identify it.

(Thereupon said photograph was introduced in evidence and marked Exhibit 1 to the direct examination of Robert Wayne Ellis.)

Q. (By Mr. Carter) Did you hear anything this same night strike the home of Mr. Duckett?

A. Pardon?

Q. Did you hear the shots strike or anything?

A. Yes sir.

* * *

Q. (By Mr. Taylor) You can't say, in other words, that you are absolutely positive this is the car——

A. (Interposing) Well, it was one just like it.

Q. Well, it was one just like it. But there could—— Could have been another one because they make several '60 and '61 Dodges, don't they?

A. Right.

Q. And so you couldn't positively swear that was the same car to your own knowledge?

A. I couldn't swear it was the car. Of course——

THE COURT: You may be excused.

MR. TAYLOR: Wait just a minute.

Q. (By Mr. Taylor) Now something else, don't you know that hole could have been in there for a long time? It could have been, couldn't it? You couldn't tell whether it had or not? Could you?

A. Well——

Q. (Interposing) That's true, isn't it? You couldn't tell for sure, could you? You couldn't swear positively that you made that hole, could you?

A. No sir.

Q. But you are pretty well satisfied you put it there because you were shooting at it and you're a good marksman, is that right?

A. Right.

Q. And you fired three shots at it——

A. (Interposing) Right.

Q. Trying to hit it?

A. No.

Q. Well, why didn't you try to hit it with the other two shots?

A. All I wanted to do was mark it. I did not want to hit no one.

* * *

Q. Now you don't— You didn't see these boys in Monroe County that night, did you?

A. No.

Q. And you don't know who was in that car——

A. (Interposing) No sir.

Q. (Continuing) do you?

A. No.

* * *

HOWARD KIRKPATRICK,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CARTER:

Q. For the record, what is your name, sir?

A. Howard Kirkpatrick.

Q. What office, if any, do you hold in Monroe County?

A. Sheriff.

Q. How long have you been Sheriff there, Mr. Kirkpatrick?

A. Since '60. Five years and a half.

Q. All right, on the night of February 25, 1966, Sheriff, what—at approximately eleven o'clock what, if anything, were you doing?

A. I was at the jail.

Q. When was the first notification of any trouble that you received involving a shooting at the home of Lloyd Duckett?

A. We got a telephone call.

Q. What did you do?

A. I got in my car and started that way in a very few minutes. The first time we got a description of the car. I mean they gave us the description of the car.

Q. Well, did you have your officers put a description out on the radio?

A. Yes sir, I did.

Q. And when you arrived at the home of Lloyd Duckett what, if anything, did you do?

A. Well, before I— Well, I got some of the people and we came on over to Athens.

Q. Before you arrived there, what, if anything, did you do?

A. They notified me by radio that they had a——

MR. TAYLOR: (Interposing) We except to that, Your Honor?

THE COURT: Well, what information did you have?

THE WITNESS: How shall I answer? Just——

THE COURT: (Interposing) Well, were you alerted in any way——

THE WITNESS: (Interposing) Yes sir.

THE COURT: (Continuing) about any particular car?

THE WITNESS: Yes sir. I was alerted that the car had been stopped that fit the description of the car that we put out—in McMinn County.

THE COURT: Did you have information as to who stopped it or who had the car?

THE SHERIFF: Yes sir.

Q. (By Mr. Carter) Immediately thereafter where did you go?

A. I went on to the Duckett home.

Q. All right, and what, if anything, did you do when you arrived at the Duckett home?

A. Well, I inspected around the Duckett house. Couldn't find anything and we got the people up there and came over to Athens with them.

Q. All right, sir, when you arrived at McMinn County Jail what, if anything, did you find?

A. Of course, they was several people there.

Q. Well, did you see an automobile of any sort there?

A. Yes sir.

Q. Where did you obtain that weapon?

A. It was turned over to me by the McMinn County Sheriff's Department.

Q. Was there any kind of pellets or anything like that also turned over to you?

A. Yes sir. I believe it's two boxes.

Q. All right, sir, did the Ducketts or any person in their family turn over a bullet to you which was found——

MR. TAYLOR: Object to what was found. Just tell——

THE COURT: (Interposing) Yes.

Q. (By Mr. Carter) What was turned over to you by the Duckett family, if anything?

A. A pellet.

Q. Did you compare that pellet with the pellet which was given to you by the McMinn County Sheriff's Department?

A. I wouldn't be qualified to compare——

Q. (Interposing) I'm not asking if you're an expert, Sheriff. All I'm doing is asking you if you did compare them by looking at them.

MR. TAYLOR: We object to that, Your Honor.

THE COURT: He said he wasn't qualified but he can tell if he made a comparison.

A. (By the witness) Yes sir, I did.

Q. (By Mr. Carter) Did they appear to be the same as——

MR. TAYLOR: (Interposing) Except to appearing.

THE COURT: I overrule.

A. (By the witness) Yes sir. They seemed to be the same type.

THE COURT: Now the weapon that was turned over to you, who turned it over to you?

THE WITNESS: The Sheriff over at McMinn.

THE COURT: What kind of a weapon was it?

THE WITNESS: Well, I never did see one like it before. They call it an air gun or a pellet gun. It would make you think of a 22 rifle just to look at it but not as long a barrel.

THE COURT: You've never seen one like it?

THE WITNESS: I don't believe I had; no sir.

Q. (By Mr. Carter) Had you ever seen any pellet like this before, Sheriff?

A. No, sir, I don't believe I've ever seen those pellet guns with those pellets before.

Q. All right. Did you establish the ownership of the automobile in your investigation?

A. Yes sir, I——

Q. (Interposing) Who owned the automobile?

A. I would have to check the radio log on that. I didn't refresh up but I am pretty sure that fifty-two— May I refer to this, Your Honor?

THE COURT: Yes.

A. (Witness continuing) This R 23-62——

MR. TAYLOR: (Interposing) That would be hearsay as to who the number was registered to.

THE COURT: Did you check to determine who owned the car?

THE WITNESS: By the registration.

THE COURT: Well what did it show?

THE WITNESS: It was to a Mr. McKinney. I don't remember the full name——

MR. TAYLOR: (Interposing) We except to that, Your Honor.

THE COURT: Well, do you want——

MR. CARTER: (Interposing) Do you want us to bring the County Court Clerk here? Bring the clerk and go through that formality?

MR. TAYLOR: No.

THE WITNESS: Your Honor, I'm talking about the license tag.

THE COURT: That's the way I understood you. They're excepting to it and technically the exceptance is good. If you want the County Court Clerk here——

MR. CARTER: (Interposing) He's not insisting on it, Your Honor.

THE COURT: All right. Go ahead.

MR. CARTER: That's all.

* * *

THE COURT: Do you have the gun with you?

THE WITNESS: No sir. It's locked up at Madisonville.

THE COURT: Madisonville?

THE WITNESS: Yes sir.

MR. TAYLOR: That's all. Come down.

THE COURT: Are you offering this gun and ammunition in evidence?

MR. CARTER: I would like to but he didn't bring it——

THE COURT: Let it be treated as filed and withdrawn.

* * *

LOYD POWERS,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CARTER:

Q. What is your name, for the record?

A. Loyd Powers.

Q. What do you do, Mr. Powers?

A. Deputy Sheriff.

Q. How long have you been a Deputy Sheriff?

A. Three and a half years.

MR. TAYLOR: We will admit he is a deputy sheriff with the present Sheriff and a good sheriff and deputy.

THE COURT: All right.

Q. (By Mr. Carter) Mr. Powers, what were you doing on the night of February 25, 1966?

A. I was a deputy sheriff out patrolling in a patrol car.

Q. And where were you?

A. Out here on the— Well, just around here and yonder but approximately the time that—around eleven o'clock I was in front of Frederick's Drive-In on the Old Etowah Road.

Q. All right. On this occasion were you by yourself?

A. I was. Yes sir.

Q. What, if anything happened on this night, Mr. Powers, concerning John Blackwell, Ed McKinney and Wayne Dyke that you can relate to the Court?

A. I heard a call from the Sheriff of Monroe County over this two-way radio giving to ours—our station here—that they had had a shooting into a house in Monroe County——

MR. TAYLOR: Object to he just heard a call— Had a call——

THE COURT: (Interposing) All right. You were alerted about a shooting, then what happened?

THE WITNESS: Oh, to be on a lookout for——

Q. (By Mr. Carter) Did you get a description of the automobile?

MR. TAYLOR: That would be hearsay.

THE COURT: Well, overrule.

Q. (By Mr. Carter) Did you get a description of the automobile?

A. Not exactly. All I got is just that it would be an old make model car. Kinda old make model car.

Q. Go ahead.

A. So I went from there towards Englewood. Drove towards Englewood. Just this side of Englewood City Limits I met three cars. The front car I looked at it and seen it was kinda an old model car. As the car went by me I looked back and it had the right-hand tail light out. These other two cars were running up pretty close to it. I go on up here and turn around, start back after this car to see if this was the car they were looking for. It had done topped over the hill at this time; all three cars had from where I was. I come on over the hill and I spotted the car again by the right tail light being out on it. I passed these other two cars behind it within about a mile's time from where I met them at, where I passed these other two cars. This car here, I never did pass this car and never did catch up with it. It was running at a high speed, high rate of speed. I was running seventy to eighty miles an hour. I chased the car on for a couple of miles. It was still ahead of me. I called into the City Police Department that they had a car out in the "Three-Point" area—to be out there on this car—that I was after a car that I wanted to check out——

MR. TAYLOR: We object to this——

THE COURT: (Interposing) Let the record show that it is overruled. Go ahead.

Q. (By Mr. Carter) Go ahead.

A. And they advised me that they did have a car in that vicinity; that they would be out there waiting for this car. I come on in. I could just stay in sight of this car's tail lights—light—curve just above it is where we call Three-Point Service Station on Englewood Road and I come around this curve and these boys was pulling out behind this car—police car—with the red light on. I come on and by the time they got the car stopped I was behind their car at that time.

Q. Who got out of that automobile, Mr. Powers?

A. What's that?

Q. If you know. Who got out of that automobile?

A. Ed McKinney was sitting on the driver's side. He was driving the car. Took him out. Hadn't nobdy got out of the car when I got there.

Q. Who was in the car, then?

A. And Wayne Dyke was sitting on the right-hand side on the front seat and John Blackwell was sitting in the back seat of the car.

Q. What, if anything, did you find in that car?

A. At that time we talked to the boys——

Q. (Interposing) What did they say, if anything?

A. I don't remember what they said but we talked to them there—in conference there—and we discovered a bullet hole in the back of this car.

Q. What did they say about that, if anything?

A. They made a remark that it had been in there a long time.

Q. And who said that?

A. Ed McKinney, I believe it was.

Q. All right. What did you find later in the car, if anything?

A. At that time we seen the bullet hole was just a fresh hole. Been a fresh hole, see. Wasn't even no rust spot or anything. Fresh hole through the body of the car, and——

Q. (Interposing) The first hole, or did you say a fresh hole, or what?

A. It was a fresh hole. Wasn't no rust spot or anything on the hole, you see. Where the bullet went through the hole in the back of the car they wasn't no rust spot or anything on it.

Q. All right. Go ahead.

A. I went back to my car at that time, picked up the two-way radio, advised Sheriff Kilpatrick that we thought we had the right car and to come on it this County——

Q. (Interposing) Don't——

MR. TAYLOR: We object——

Q. (Mr. Carter, continuing) Don't tell about that.

THE COURT: Yes.

Q. (By Mr. Carter) Don't tell about that. Just tell what you did after you picked them up. What did you do after you talked to the Sheriff.

A. We— At that time they advised the boys they was going to take them on to the jail.

Q. You told——

A. (Interposing) McKinney, Dyke and Blackwell.

Q. Blackwell.

A. That we was going to take them on to the jail.

Q. All right.

A. We took them on to the jail; advised McKinney, after we took him into the jail he was under arrest for reckless driving.

Q. All right.

A. We set them on the bench there in the jail. Set them on the bench. Told them to set there on the bench and we went on back out at that time and searched the car. On the right-hand side of the front seat I taken a gun from under the front seat; stuck back under the front seat.

MR. TAYLOR: We object to that.

THE COURT: I overrule.

MR. TAYLOR: Note our exception.

Q. (By Mr. Carter) Go ahead.

A. And——

THE COURT: (Interposing) You might be in good shape in a Criminal Court, but this is not Criminal Court, Mr. Taylor.

Q. (By Mr. Carter) Go ahead, Mr. Powers.

A. I also found some ammunition in the seat where Ed McKinney was sitting for this gun.

* * *

Q. All right. Did you identify this car by the license number or anything like that?

A. It had a license number R23-62 on the back of the car at the time that we brought it into the jail and it also had another tag tied under the 23-62.

THE COURT: Did you make this picture?

THE WITNESS: That's the same car.

THE COURT: Did you make this picture? Photograph?

THE WITNESS: That's the same car.

THE COURT: I say did you make this picture?

THE WITNESS: No sir.

THE COURT: Have you seen it before?

THE WITNESS: No sir.

THE COURT: Well, can you tell us by looking at this whether that is the same car you——

THE WITNESS: (Interposing) Yes sir, it's the same——

THE COURT: (Continuing) searched that night?

THE WITNESS: Yes sir. This is the same tag and same license on the outside and the same Michigan tag on the inside and also the same hole right here in the trunk, in the back of the car, right here on that side.

THE COURT: Go ahead, Mr. Carter.

Q. (By Mr. Carter) Did you have your siren on when you were chasing these people? Was your siren on?

A. Allen, I did part of the time and part of the time I didn't have, see.

Q. What about your red light, if any?

A. I didn't have any red light on at that time?

Q. How far behind them were you when you were giving chase? Just your best estimate?

A. As far back as the ball park there anyhow. As far as from here over to the ball park there. I never did get no closer than that to them until I got them stopped, see.

THE COURT: For the record, how far is that in feet? Your best estimate?

THE WITNESS: I would say four or five hundred feet. Four or five hundred feet.

MR. CARTER: I think you may ask him, Mr. Taylor.

* * *

Q. . . . Of course, you don't know what happened in Monroe County, do you?

A. No sir.

Q. And you discovered this rifle in the car a long time after you arrested them out here at the Englewood intersection?

A. I taken it out of the car after we got to the jail.

Q. That's right.

A. After we got to the jail.

Q. And, of course, that was after they had been arrested and then you went out and found the gun and the ammunition?

A. That's right.

MR. TAYLOR: That's all. Of course, we are excepting to all this.

THE COURT: Yes. Let the record show the exception made and overruled.

* * *

CALVIN CANNON,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CARTER:

Q. For the record, what is your name, please sir?

A. Calvin Cannon.

Q. And what official capacity do you hold in McMinn County?

A. Sheriff.

Q. On the night of February 25, 1966, or in the early morning hours of February 26, 1966, where were you Sheriff?

A. I was at the McMinn County jail.

Q. Of course, you don't know anything other than what you heard about what happened in Monroe County?

A. That's correct.

Q. Did you on this night or in the early morning hours ever see the three defendants?

A. Yes sir. Approximately eleven-thirty the first time.

Q. All right, did you see the automobile in which they were riding?

A. Yes sir, I did.

Q. Did you make an investigation of the automobile?

A. I went out and looked at the automobile and checked it and found where that a bullet or—had entered into the trunk of the automobile and picked up the fragments of the bullet. It hit the frame after it went through and also a tool box and, of course, there was the fresh lead, real bright——

MR. TAYLOR: I object to that. He didn't have a search warrant to go in the back of the car.

THE COURT: I overrule.

MR. CARTER: I think you may ask him.

CROSS EXAMINATION

BY MR. TAYLOR:

Q. Sheriff, that's all you know about it, isn't it?

A. That's all I know. Just what happened——

MR. TAYLOR: (Interposing) That's all. Come down.

THE COURT: What kind of a car was it, Sheriff?

THE WITNESS: This was a two-tone 1960 Dodge.

THE COURT: Look at this picture. Is this a picture of the car you inspected on that evening?

THE WITNESS: Yes sir. Same tag number and the bullet hole, of course, in this location. Also I remember specifically this sticker on the back, "Repeal 14B".

THE COURT: Very well.

RE-DIRECT EXAMINATION

BY MR. CARTER:

Q. Did you see the bullet hole there yourself?

A. Yes sir.

Q. Well, could you determine whether or not it was a new hole or an old one?

A. Well, I couldn't say exactly how new but it was a—it was of a recent time because there was no rust or anything. It was a bright hole and the fragments of the lead from the bullet which had penetrated was there and it was real bright, just like it had been fresh cut.

RE-CROSS EXAMINATION

BY MR. TAYLOR:

Q. Of course, this could have been done the day before, two days before or the week before or a month before, couldn't it?

A. I'm not an expert on that. In my opinion, no.

Q. In your opinion, no, but you're not an expert? In other words it couldn't have been done the day before? It had to have been done that night?

A. In my opinion.

* * *

HERSHEL JACK,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CARTER:

Q. What is your name, please sir?

A. Hershel Jack.

Q. And where do you work, Mister——

A. (Interposing) Athens Police Department.

* * *

Q. Did you see the defendant John Blackwell, Wayne Dyke and Ed McKinney on this night?

A. I did.

Q. Well, will you tell the Court about this?

A. Well——

Q. The first time you saw them, when was it?

A. When Loyd Powers called us to block the intersection——

Q. (Interposing) And where did you block the intersection?

A. Three-Point, ah, we pulled in behind them at Three-Point Service Station and stopped them at the New Etowah Road at that "Yield Right of Way" sign.

Q. And is that in the City of Athens?

A. Yes.

Q. Who was driving? First of all, what kind of an automobile did you stop?

A. It was a Dodge.

Q. And who was in this Dodge that you stopped?

A. Ed McKinney, Dykes—Wayne Dykes—ah——

Q. (Interposing) Well, do you recognize them here?

A. Yes.

Q. Those three gentlemen there?

A. Yes.

Q. Who was driving the automobile?

A. Ed McKinney.

Q. Where was Mr. Dyke sitting?

A. He was sitting on the right-hand side.

Q. Where was Mr. Blackwell sitting?

A. He was sitting in the back seat.

Q. What, if anything, did they say to you there?

A. They didn't say anything. I told them that we had a call; that this car was involved in a shooting or something or that we had a complaint on something that met that description and we were holding them until the officer got there that was running them—or was after them. They didn't make any statement.

* * *

THE COURT:

* * *

Actually this proceeding is of the nature of quasi criminal. It's neither civil. It's neither criminal but it is of the nature of quasi criminal

* * *

COMPLAINANT RESTS

THE COURT: Defendants offering any proof?

MR. TAYLOR: Give us five minutes, Your Honor.

THE COURT: We'll take a ten-minute recess.

(thereupon a recess was had)

THE COURT: Mr. Taylor, any proof?

MR. TAYLOR: Not at this stage,

* * *

MR. CARTER: In this case we think it without question that the proof is here and we admit, of course, that it is circumstantial evidence, but we think this is certainly a strong case. We have the proof here of this automobile, which has been identified, going past the Duckett home, the occupants of which fired a shot toward the Duckett home, thereupon a shot was returned in answer; striking this automobile.

We have the proof of two witnesses that saw the flash come from the rear of the car. They indicated that that is where the bullet hit the automobile. The automobile—Of course, a call was sent in to the Monroe County Sheriff's Department, the description of the automobile was put out on the wire, and this automobile which contained three McMinn County men was apprehended in the City of Athens some time later, and the automobile had in it a bullet hole which was fresh. The fragments of the lead was found inside the trunk. In this automobile was found Ed McKinney—these defendants—Ed McKinney, John Blackwell and Wayne Dyke.

Now the question is: What was that gun doing in the automobile? We think the proof here, without question is substantial. What was the gun doing in the automobile? There was a gun there, and the Sheriff of Monroe County said that he compared the pellet which was found at the Duckett home with the pellet which was found in the automobile. He said that he had never seen a gun like this before. He said he had never seen pellets like this before and he said they were similar; that they were comparable. That's what he said.

We have proof here that certainly these men had a motive to go up there and if they had no motive they wouldn't have been in that part of the country.

We have proof here by this photograph—the ownership of the car—the car was owned by Ed McKinney. The description of the car fits and we think we have proved a circumstantial case here which is certainly strong, and Mr. Taylor's motion should be overruled and denied.

* * *

MR. TAYLOR: That's right. And since it has been mentioned here, these boys are on strike and so forth—They're poor fellows, poor lawyer, and I don't think the punishment should be severe. I don't think there should be a fine, if the Court should see fit, for them to have the ex-

pense of making bond, and I think that the Court, in view of the case— It's pretty flimsy circumstantial, and the elements, the elements of a criminal offense, the motive. The motive. They haven't proven any desire on these boys' part to intimidate that man or commit the offense of shooting at him. And something else, this thing they picked up there, you know, looked like a bullet, you know, and this, one of these men fired a .22 rifle and I was certainly glad to learn that these men were only charged with using an air rifle, and they didn't see fit to offer it, and I submit to the Court —and I think these boys should be given the benefit of the doubt.

* * *

THE COURT: Of course, this case is premised entirely upon circumstantial evidence. That's all we have. However, when circumstantial evidence is such that it rules out every other reasonable hypothesis, then there isn't any case as strong, even in criminal law, and this is quasi criminal The only question here is whether or not these gentlemen violated this Court's order, and if they did they should be punished, and if not, they should be acquitted.

It is the duty of this Court to enforce its orders. If it doesn't do that it might as well close the doors, lock them or leave them unlocked and throw the keys away. I have no trouble at all with the proof which I have heard and I have weighed it in its severest form, that the charges made must be proven beyond a reasonable doubt.

I find these three defendants guilty of the act charged. I am going to fine them $50.00 each, give them ten days in jail, each.

ASSIGNMENT OF ERRORS FOR THE APPELLANT

* * *

SPECIFICATIONS OF ERROR

1. The Court erred in denying the defendants a trial by jury. See Motion for New Trial, ground no. 1 (Tr. 84) The defendants' answer demanded a trial by jury. (Tr. 74) The Court noted and denied the demand for jury trial. (Tr. 99) The defendants had a right to trial by jury by reason of Title 40, §2504, Code of Tennessee (1956); Art. 1, §6 of the Constitution of the State of Tennessee; and the 7th Amendment to the Constitution of the United States.

* * *

3. The Court erred in admitting evidence of an air-rifle found in the automobile without a search warrant. See Motion for New Trial, ground no. 4. Sheriff Powers searched the car in question without a search warrant and testified he found a gun.

> "A. We set them on the bench there in jail. Set them on the bench. Told them to set there on the bench and we went on back out at that time and searched the car. On the right-hand side of the front seat I taken a gun from under the front seat; stuck back under the front seat.
>
> "MR. TAYLOR: We object to that.
>
> "THE COURT: I overrule.
>
> "MR. TAYLOR: Note our exception.
>
> "Q. (By Mr. Carter) Go ahead.
>
> "A. And——
>
> "THE COURT: (Interposing) You might be in good shape in a Criminal Court, but this is not Criminal Court, Mr. Taylor.
>
> "Q. (By Mr. Carter) Go ahead, Mr. Powers.
>
> "A. I also found some ammunition in the seat where

Ed McKinney was sitting for this gun." (Tr. 142-143)

Over objection the Court allowed the evidence noting perceptively that "you might be in good shape in a Criminal Court, but this is not a Criminal Court, Mr. Taylor." (Tr. 143) The defendants were entitled to Constitutional protection (both State and Federal) from unreasonable search and seizure which was denied them by reason of the Court's assumption of criminal jurisdiction.

* * *

PROPOSITIONS OF LAW

PROPOSITION OF LAW I.

In cases of contempt of court committed outside the presence of the court there is a constitutional and statutory right to trial by jury.

Tennessee Code Ann., ch. 21, §1011.

Tennessee Constitution, Art. 1, §6.

U. S. Constitution, Amendment VI.

U. S. Constitution, Amendment XIV.

* * *

PROPOSITION OF LAW III.

Evidence obtained by means of an illegal search and seizure is inadmissible in state court proceedings.

Ellis v. *State,* 364 S. W. 2d 925 (1963)

Mapp v. *Ohio,* 367 U. S. 643 (1961)

Tennessee Constitution, Art. I, §7.

U. S. Constitution, Amendment IV.

U.S. Constitution, Amendment XIV.

OPINION (TENNESSEE SUPREME COURT)

This appeal comes from the Chancery Court of McMinn County, Tennessee. In that court, Wayne Dyke, Ed McKinney and John Blackwell were found guilty of criminal contempt and given the maximum sentence under T.C.A. §23-903 of ten days in jail, plus a $50.00 fine.

This prosecution for criminal contempt arose out of an alleged violation by the three previously named persons of an injunction issued by the McMinn County Chancery Court. That injunction, arising out of a labor controversy, in pertinent part reads as follows:

> "(c) From inflicting harm or damage upon the persons or property of Complainant's employees, customers, visitors or any other persons. This includes but is not limited to the throwing of tacks or other sharp objects on the roadway or driveway;"

It was alleged that the three defendants in the contempt proceeding had fired shots at or into the home of one Lloyd Duckett, a nonstriking employee of the appellee. Evidence presented at the contempt proceeding supports this accusation.

The appellants have filed the following assignments of error in this Court:

> "1. The Court erred in denying the defendants a trial by jury. See Motion for New Trial, ground No. 2. (Tr. 84) The defendants' answer demanded a trial by jury. (Tr. 74) The court noted and denied the demand for jury trial. (Tr. 99) The defendants had a right to trial by jury by reason of Title 40, §2504, Code of Tennessee (1956); Art. 1, §6 of the Constitution of the State of Tennessee; and the 7th Amendment to the Constitution of the United States.
>
> "2. The offense charged against the defendants was a crime and a felony under the laws of Tennessee and the Chancery Court is without jurisdiction to enjoin

violation of the criminal laws of the State of Tennessee. Se Motion for New Trial, grounds No. 3, 5, and 8. (Tr. 84-85) The facts made the basis of the charge of contempt, assuming arguendo they are true, are also violative of the Criminal Code of Tennessee and are punishable thereunder. Thus, the defendants could well have been charged with violation of, for example, Article 39, §4901, Article 39, §603, Article 39, §1101, or Article 39, §4501, of the Code of the State of Tennessee. The Chancery Courts do not exist to enforce the criminal code. The defendants were tried in a summary fashion without the Constitutional guarantees otherwise theirs. The Constitution of the State of Tennessee shows great concern for the rights of the accused. From arrest to trial to appeal, the defendant accused of a crime is protected from abuse by the State. These defendants are entitled as a matter of right to that protection.

"3. The Court erred in admitting evidence of an air-rifle found in the automobile without a search warrant. See Motion for New Trial, ground no. 4. Sheriff Powers searched the car in question without a search warrant and testified he found a gun.

" 'A. We set them on the bench there in jail. Set them on the bench. Told them to set there on the bench and we went on back out at that time and searched the car. On the right-hand side of the front seat I taken a gun from under the front seat; stuck back under the front seat.

" 'MR. TAYLOR: We object to that.

" 'THE COURT: I overrule.

" 'MR. TAYLOR: Note our exception.

" 'Q. (By Mr. Carter) Go ahead.

" 'A. And——

" 'THE COURT: (Interposing) You might be in

good shape in a Criminal Court, but this is not Criminal Court, Mr. Taylor.

" 'Q. (By Mr. Carter) Go ahead, Mr. Powers.

" 'A. I also found some ammunition in the seat where Ed McKinney was sitting for this gun.' (Tr. 142-143)

"Over objection the Court allowed the evidence noting perceptively that 'you might be in good shape in a Criminal Court, but this is not a Criminal Court, Mr. Taylor.' (Tr. 143) The defendants were entitled to Constitutional protection (both State and Federal) from unreasonable search and seizure which was denied them by reason of the Court's assumption of criminal jurisdiction.

"4. The Court erred in permitting evidence, over the objection of defense counsel, of some type of bullet or missile which the complainant refused to offer into evidence. Sheriff Kirkpatrick was allowed to testify as to comparisons of the bullet found near the Duckett home and another bullet allegedly handed him by the sheriff of McMinn County. (Tr. 134, 135)

" 'THE COURT: Do you have the gun with you?

" 'THE WITNESS: No. sir. It's locked up at Madisonville.

" 'THE COURT: Madisonville?

" 'THE WITNESS: Yes, sir.

" 'MR. TAYLOR: That's all. Come down.

" 'THE COURT: Are you offering this gun and ammunition in evidence?

" 'MR. CARTER: I would like to but he didn't bring it.

" 'THE COURT: Let it be treated as filed and withdrawn.' (Tr. 137)

The defendants were deprived of the right to cross-examine in accordance with the statutes and Constitu-

tion of the State of Tennessee and the Constitution of the United States."

Appellant's first assignment of error and major contention is that the trial court erred in denying appellants a trial by jury. It is asserted that this denial violates the right to trial by jury contained in T.C.A. §40-2504, Article 1, Section 6 of the Constitution of the State of Tennessee, and Amendment 7 of the Constitution of the United States. This assignment of error is wholly without merit. This Court, in *Pass* v. *State* (1944) 181 Tenn. 613, 184 S.W.2d 1, has answered this question in clear and unmistakable terms, both with respect to the statutory right to jury trial in Chancery Court provided in T.C.A. §40-2504 and right to jury trial under the Tennessee Constitution. It would serve no purpose but that of supererogation to attempt to restate the law of Tennessee in this regard, when it has been so ably and lucidly stated in the case just cited.

Likewise, that opinion takes into full account the 7th Amendment to the Constitution of the United States. It is completely clear that the result we reach in this case would be the same under Federal jurisdiction. The United States Supreme Court decisions cited and quoted from in *Pass* v. *State,* supra, have lately been brought down to date in the opinion of that Court in *Cheff* v. *Schnackenberg* (1966) 384 U.S. 373, 16 L.Ed.2d 629, 86 S.Ct. 1523. It inevitably follows, upon consideration of these decisions, that the first assignment of error must be overruled.

Appellants' assignment of error 2 urges that the Chancery Court was without jurisdiction to issue the injunction found to be violated. The assignment is based upon the fallacy that such injunction sought to and did enjoin violation of the criminal laws of the State of Tennessee, as such. However, this is clearly not the case here. This injunction was issued (1) to protect the property and personal rights of the Taylor Implement Manufacturing Company, Inc. and its non-striking employees; and (2) to maintain an atmos-

phere of reasonable tranquility in which a labor dispute might be resolved. See 28 Am. Jur. 655 (Injunctions-Sec. 157). It is also the law of this State that even if the injunction were improperly issued, as contended by the appellants, they are required to obey it as long as it continues in force; and would be guilty of contempt of court if they failed to obey it. See *Nashville Corp.* v. *United Steelworkers of America, CIO* (1948) 187 Tenn.444, 215 S.W.2d 818.

Appellants' assignment of error 3 argues that the trial court erred in admitting evidence relating to an air rifle found in appellant McKinney's automobile. It is true that such weapon was found by search of the automobile, without search warrant. The evidence contained in this record shows, however, that the search of the car was made after the appellant McKinney had been arrested for reckless driving. No question is made but that this was a lawful arrest. The question then is whether the search was reasonable or otherwise. The gun was found, according to the only evidence contained in the record, under the front seat of the automobile. It is the law of this State that, within reasonable limits, the police may search pursuant to a lawful arrest the person and property of the person arrested for evidence of the crime for which he is arrested, and for weapons which might be utilized for resistance or escape. It is the opinion of this Court that the search here conducted was within those reasonable limits. If so, evidence of other unlawful conduct produced pursuant to a lawful search of this type is admissible in prosecution based upon such other unlawful conduct. See *Church* v. *State* (1960) 206 Tenn. 336, 333 S.W.2d 799, and *Elliott* v. *State* (1938), 173 Tenn. 203, 116 S.W.2d 1009.

Appellants' fourth assignment of error is that the trial court erred in allowing a Sheriff Kirkpatrick to testify as to comparisons he made of a projectile found near the Duckett home and another projectile allegely given him by

the Sheriff of McMinn County. The latter was taken from the car of the appellant McKinney. The main basis of objection to this testimony seems to be that these projectiles were not introduced into evidence. No authority is cited to support appellants' contention that for the court to allow Sheriff Kirkpatrick's testimony, it was necessary to introduce the projectiles into evidence. Further, the appellants fail to point out how or if they were prejudiced by the failure to enter the projectiles into evidence. This Court is of the opinion that Sheriff Kirkpatrick's testimony was admissible. Even if his testimony was not admissible, it would constitute, at most, harmless error. Here, there is no jury to be misled if, in fact, misleading testimony was given, but rather this case was tried by a Chancellor, with knowledge of the law and the rules of evidence.

It is the opinion of this Court that, even without this evidence, sufficient evidence is contained in the record to fully justify the Chancellor's finding. Thus, an error in admitting evidence, if such were present, would not indicate reversal. See *Bowdon* v. *Bowdon* (1955) 198 Tenn. 143, 278 S.W.2d 670.

The judgment of the trial court is affirmed, with costs of this appeal assessed against the appellants.

LARRY CRESON,
Justice

Burnett, C.J.,
Dyer and Chattin, JJ.,
Harbison, Sp. J., concur

OPINION ON PETITION TO REHEAR

We have been presented with a petition to rehear. The petition urges that this Court overlooked some of petitioner's contentions in arriving at its earlier opinion. It is sufficient to say that all of these contentions were considered by the Court in arriving at its original opinion. This Court is under no obligation to specifically answer every question made, simply because the same is made, regardless of how obviously devoid of merit.

The petition to rehear filed in this case is simply a reargument of those issues and contentions considered by this Court in preparing its original opinion. All of these contentions and the authorities cited in support of them were given full consideration by the Court and this Court feels no necessity to again review these questions.

No new argument is made, no new authority is adduced, and no material fact is pointed out as overlooked.

The petition to rehear is denied.

LARRY CRESON,
Justice

Burnett, C.J.
Dyer and Chattin, JJ.,
Harbison, Sp. J., concur

No. 1373

MAY 10 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

WAYNE DYKE, ED MCKINNEY AND JOHN BLACKWELL,
Petitioners,

v.

TAYLOR IMPLEMENT MANUFACTURING COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee, which is unreported at this time, was entered on November 14, 1966. The opinion is reproduced as Appendix A and attached hereto. The opinion on Petition to Rehear was entered on February 10, 1967, and is attached hereto as Appendix B. This opinion is also unreported at this time.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Tennessee was entered on November 14, 1966. A timely petition for rehearing was filed, and was denied on February 10, 1967. The jurisdiction of this Court is founded upon 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Was the following described search and seizure conducted in contravention of petitioners' rights under the Fourth and Fourteenth Amendments to the Constitution of the United States:

> Petitioners were apprehended on an open highway and arrested for reckless driving. They, and their car, were taken to the county jail. While petitioners were detained inside the jail on the reckless driving charge, police officers, without a warrant, went outside, searched the car, and found and seized a gun located beneath the front seat.

2. Does the introduction of materials obtained by an unconstitutional search and seizure into evidence in a State court trial for criminal contempt contravene the Fourteenth Amendment to the Constitution of the United States?

3. Is a defendant in a State court trial for criminal contempt entitled under the Fourteenth Amendment to the Constitution of the United States to a trial by jury, where the conduct alleged as contempt (firing a rifle into an occupied house) is not petty or trivial but is a felony under the law of the State?

4. Where the State Constitution requires a jury trial in every criminal case in which imprisonment may result, may the State, consistent with the Fourteenth Amendment to the Constitution of the United States, deny a jury trial to a defendant charged with criminal contempt and, upon finding him guilty, imprison him?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States:

Amendment IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreason-

able searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * *."

Amendment XIV. "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 23, Tennessee Code Annotated

Section 902. Scope of power—The power of the several courts to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases:

> (3) "* * * The wilful disobedience or resistance of any . . . party . . . or any other person, to any lawful writ, process, order, rule, decree, or command of said courts.

Section 903. Punishment—The punishment for contempt may be by fine, or imprisonment, or both; but where not otherwise specially provided, the circuit, chancery, and appellate courts are limited to a fine of fifty dollars ($50.00), and imprisonment not exceeding ten (10) days . . ."

Title 39, Tennessee Code Annotated:

Section 601. "Assault with deadly weapon—Penalty.—If a person assaults and beats another with a cowhide, stick, or whip, having at the time in his possession a pistol or other deadly weapon, with intent to intimidate the person as-

saulted, and prevent him from defending himself, he shall, on conviction, be imprisoned in the penitentiary not less than two (2) years nor more than ten (10) years."

Section 603. "Assault with intent to commit felony—Attempt to commit felony—Penalty.—If any person assault another, with intent to commit, or otherwise attempt to commit; any felony or crime punishable by imprisonment in the penitentiary, where the punshment is not otherwise prescribed, he shall, on conviction, be punished by imprisonment in the penitentiary not exceeding five (5) years, or, in the discretion of the jury, by imprisonment in the county workhouse or jail not more than one (1) year, and by fine not exceeding five hundred dollars ($500)."

Section 613. "Shooting or throwing missile calculated to produce death or bodily harm—Penalty.—Any person who wantonly or maliciously either shoots, or throws any missile calculated to produce death or great bodily harm, at or into any dwelling or any other house which is being used or occupied . . . shall be declared guilty of a felony, and, upon conviction, shall undergo confinement in the penitentiary for a period not less than one (1) year nor more than five years."

STATEMENT OF THE CASE

The employees of Taylor Implement Manufacturing Company, Inc., in Athens, McMinn County, Tennessee, chose the United Steelworkers of America, AFL-CIO, as their collective bargaining representative. The Union was certified by the National Labor Relations Board on September 20, 1965 (R. 2).*

Negotiations for a contract were unavailing and a legal strike began on January 12, 1966 (R. 2). Petitioners were employees who participated in the strike.

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* As used in this petition, "R" refers to Volume I of the Record prepared by the Clerk of the Supreme Court of Tennessee, and "R (Vol. II)" refers to Volume II.

The Company sought and obtained a state court injunction, from the Chancellor of the McMinn County Equity Court, which enjoined the Union and its striking members:

> "(c) From inflicting harm or damage upon the person or property of Complainant's employees, customers, visitors, or any other persons. This includes but is not limited to the throwing of tacks or other sharp objects on the roadway or driveway;"

On February 25, 1966, a shot was fired from a 1960 Dodge automobile into the home of a nonstriking employee who lived in a neighboring county, Monroe County, about 25 miles from the struck plant (R. 95-96). McMinn County police received a report on their car radio that the shooting had occurred, and that the automobile involved was an "old make model car" (R. 139).

Shortly thereafter, McMinn County police observed "kinda an old model car", with its right tail-light out, speeding down a highway (R. 139-40). They stopped the car, observed a bullet-hole in the trunk, and arrested the occupants (petitioners) for reckless driving (R. 139-42). Petitioners were taken to the county jail (R. 142); and the car—owned by petitioner McKinney—was towed to and parked outside the county jail (R. 120, 136). While petitioners were detained inside the jail on the reckless driving charge, police officers, without obtaining a warrant, went outside and searched the car. Their search uncovered an air rifle and ammunition (R. 134-35).

Petitioners were never criminally indicted for the shooting in Monroe County. However, on March 14, 1966, the Company filed a "Petition for Attachment for Contempt" in the McMinn County Equity Court, alleging that petitioners had fired the shot, and that their doing so violated the injunction against "inflicting harm or damage upon the per-

sons or property of Complainant's employees." More specifically, the petition alleged:

> "On or about February 25, 1966, at approximately 11 p.m. while Lloyd Duckett, a nonstriking employee of the complainant, was at his home located in Monroe County, Tennessee, along with four members of his family, an automobile drove to his premises from which a shot was fired into his home. Thereupon the fleeing car in question was pursued, identified, and caught. It was found that the three occupants of the car were John Blackwell and the defendants Wayne Dyke and Ed McKinney, all three of whom are striking employees of the complainant and members of the defendant Union. The said Wayne Dyke is the elected president of the local group of the defendant Union. A rifle of the type which fires a projectile of the sort found at the Duckett home was discovered in the car at the time of the apprehension and arrest of the said three striking employees." (R. 19.)

Defendants pleaded not guilty, and demanded a jury trial (R. 74). The Chancellor refused to provide them a jury trial (R. 99). They were tried by the Chancellor on March 22, 1966.

The only evidence linking defendants to the shooting in the adjoining county was the evidence obtained by searching the car. Deputy Sheriff Powers testified that defendants were arrested for reckless driving (R. 142); that they were brought to the county jail (R. 134-35); and that while there detained their automobile was searched and the evidence uncovered:

"A. We set them on the bench there in jail. Set them on the bench. Told them to set there on the bench and went on back out at that time and searched the car. On the right-hand side of the front seat I taken a gun from under the front seat; stuck back under the front seat.

"MR. TAYLOR: We object to that.

"THE COURT: I overrule.

"MR. TAYLOR: Note our exception.

"Q. (By Mr. Carter) Go ahead.

"A. And——

"THE COURT: (interposing) You might be in good shape in a Criminal Court, but this is not Criminal Court, Mr. Taylor.

"Q. (By Mr. Carter) Go ahead, Mr. Powers.

"A. I also found some ammunition in the seat where Ed McKinney was sitting for this gun" (R. 142-143).

The defendants were convicted and given the maximum punishment authorized, 10 days in jail and a $50.00 fine, Tennessee Code Annotated, Title 23, Section 903.

Defendants appealed to the Supreme Court of Tennessee, on the grounds, *inter alia,* that the denial of jury trial and the admission of the materials obtained from the search of the car violated their rights under the Constitution of the United States (Appendix pp. 18-19).

On November 14, 1966, the Supreme Court of Tennessee denied the appeal. On the jury trial issue, the Court merely recited that the federal Constitution does not require a jury trial (App. pp. 20-21). On the search and seizure issue, the Court found the search lawful:

> "Appellants' assignment of error 3 argues that the trial court erred in admitting evidence relating to an air rifle found in appellant McKinney's automobile. It is true that such weapon was found by search of the automobile, without search warrant. The evidence contained in this record shows, however, that the search of the car was made after the appellant McKinney had been arrested for reckless driving. No question is made but that this was a lawful arrest. The question then is

whether the search was reasonable or otherwise. The gun was found, according to the only evidence contained in the record, under the front seat of the automobile. It is the law of this State that, within reasonable limits, the police may search pursuant to a lawful arrest the person and property of the person arrested for evidence of the crime for which he is arrested, and for weapons which might be utilized for resistance or escape. It is the opinion of this Court that the search here conducted was within those reasonable limits. If so, evidence of other unlawful conduct produced pursuant to a lawful search of this type is admissible in prosecution based upon such other unlawful conduct. (App. pp. 21-22).

Defendants petitioned for rehearing, again asserting that on both issues their federal Constitutional rights had been denied. The petition for rehearing was denied on February 10, 1967 (App. p. 24).

Defendants' federal claims were asserted at all stages of the state proceedings. See, e.g. R. 74, R. 84, R. 142-143, R. (Vol. II) pp. 10-12, 75-76, 82-93.

REASONS FOR GRANTING THE WRIT

I.

In holding the search and seizure without a warrant constitutionally permissible, the decision below directly conflicts with decisions of this Court.

A. In *Preston* v. *United States,* 376 U. S. 364 (1964) the defendants, while sitting in their parked automobile, were arrested by police officers for vagrancy. The defendants were taken to police headquarters, and their car was taken to the police garage. While defendants were under detention, the police conducted a search of the car without a warrant. This Court held the search to be unconstitutional:

"The search of the car was not undertaken until petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime—assuming that there are articles which can be the 'fruits' or 'implements' of the crime of vagrancy. Cf. *United States* v. *Jeffers*, 342 U. S. 48, 51-52, 72 S.Ct. 93, 95, 96 L.Ed. 59 (1951). Nor, since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction. See *Carroll* v. *United States, supra*, 267 U. S. at 153, 45 S.Ct. at 285, 69 L.Ed. 543. We think that the search was too remote in time or place to have been made as incidental to the arrest and conclude, therefore, that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as a result of the search inadmissible" (376 U. S. at 368).

The Court dismissed the government's reliance on the "rule allowing contemporaneous searches":

"The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident

to the arrest. *Agnello* v. *United States, supra,* 269 U. S., at 31, 46 S.Ct. at 5, 70 L.Ed. 145" (376 U. S. at 367).

Here, as in *Preston,* the search was "remote in time or place from the arrest." The arrest was made on an open highway; the search was conducted outside the county jail, substantially later. Moreover, neither of the reasons assigned by the court below could justify the search. There was no need to search "for weapons which might be utilized for resistance or escape" (App. p. 22), for the defendants were already under detention in the county jail and did not have access to the automobile. Likewise the search could not be justified as "for evidence of the crime for which [defendants were] arrested" (App. p. 22), for they were arrested for reckless driving and there are no articles "which could be the 'fruits' or 'implements' of the crime" of reckless driving. Cf. *Preston* v. *U. S., supra,* 376 U. S. at 368.

Nor could the search have been justified on the ground that the police had "probable cause" to believe that defendants were involved in the shooting in the next county. No one, including the court below, has suggested that there was such "probable cause." But even if there were, it would not have validated the search. *Preston, supra,* 376 U. S. at 367-68:

> "Here, we may assume, as the Government urges, that, either because the arrests were valid or because the police had probable cause to think the car stolen, the police had the right to search the car when they first came on the scene. *But this does not decide the question of the reasonableness of a search at a later time and at another place.* See *Stoner* v. *California,* post, p. 483" (Emphasis supplied).

In upholding the search conducted here, the decision below also conflicts with this Court's decisions in *Stoner* v. *California,* 376 U. S. 483 (1964), and *James* v. *Louisiana,* 382 U. S. 36 (1965). These cases apply the principle of

Preston to State Court trials. See also, *Mapp* v. *Ohio,* 367 U. S. 643 (1961); *Ker v. California,* 374 U. S. 23 (1963).

This Court has recently granted certiorari in another automobile search case alleged to be in conflict with *Preston, Harris* v. *United States,* No. 1279, cert. granted April 17, 1967 (35 U. S. Law Week 3366). We believe that the facts of the instant case are closer to *Preston,* and therefore even more deserving of review by this Court, than those in *Harris.*

B. The Chancellor justified the admission of the evidence obtained from the search of the automobile on the ground that the exclusionary rule of *Mapp* is not applicable to a criminal contempt proceeding. As he put it "You may be in good shape in a Criminal Court, but this is not Criminal Court" (R. 143).

This rationale was not relied upon in the opinion of the Tennessee Supreme Court. In any event, it is clear that the exclusionary rule of *Mapp* applies to a trial for criminal contempt. In *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 693 (1965), this Court applied the exclusionary rule to a State Court proceeding for forfeiture of a car. This Court characterized the forfeiture as "quasi-criminal in character. Its object, like a criminal proceeding, is to penalize the commission of an offense against the law" 380 U. S. at 700. *A fortiori* the rule must be applicable to a State Court proceeding which may result in the forfeiture of the defendants' liberty, particularly when, as here, the conduct for which defendants were being tried in criminal contempt also constituted a violation of the criminal laws of Tennessee, and the trial judge described the proceeding as "quasi-criminal" (R. 173).

II.

In holding that defendants were not entitled to a jury trial, the decision below raises Constitutional issues which have not been, but should be, decided by this Court.

1. The first question presented by this holding is whether, under the guise of a contempt trial for violating an injunction, persons may be imprisoned without a jury trial for conduct which constitutes a felony under the State criminal law.

It has long been axiomatic that "equity will not enjoin a crime." The axiom survives, except in labor disputes. In certain states, it has become popular for employers to seek, and obtain, injunctions against the commission of violent acts by striking employees. If violence then occurs, the employer assumes the role of prosecutor, institutes "criminal contempt" proceedings, and seeks to imprison the strikers.

This case dramatizes vividly the extent to which this procedure places the whip in the employer's hand. The shooting which is the basis for this contempt proceeding occurred 25 miles from the employer's plant, in another county, and was directed not against the employer's property, but against the property of an employee. The authorities in that county did not see fit to institute criminal proceedings against defendants. Nonetheless, the injunction forbade violence by strikers against other employees, and the Chancellor construed it as broad enough to reach the conduct here.

The conduct with which defendants were charged—firing a rifle into an occupied house—constitutes a felony under the criminal laws of Tennessee. See, e.g., Tennessee Code Annotated, Title 39, Sections 601, 603, 613. Had defendants been tried for violation of those statutes, they would have been entitled to a jury trial. May their right to jury trial be denied by trying and imprisoning them, instead, for contempt of the injunction?

In *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966), a majority of the Justices[1] held that, in federal courts, sentences

[1] The Chief Justice, Mr. Justice Clark, Mr. Justice Brennan, and Mr. Justice Fortas so held in the opinion of Mr. Justice Clark. Mr. Justice Douglas and Mr. Justice Black, in dissent, would hold jury trials required in all criminal contempt proceedings, a holding which would seem, *a fortiori*, to provide a majority for the rule (albeit not the reasoning) stated in Mr. Justice Clark's opinion.

exceeding six months would not be permitted in criminal contempt proceedings "absent a jury trial or waiver thereof." Jury trials would not be required in lesser criminal contempt proceedings, because they are "equivalent to a procedure to prosecute a petty offense, which under our decisions does not require a jury trial." 384 U. S. at 379.

Manifestly, where, as here, the conduct which is alleged to constitute criminal contempt is also a felony under the State criminal law, the trial cannot be characterized as "equivalent to a procedure to prosecute a petty offense," even though the maximum authorized imprisonment for contempt is less than six months. The unique character of contempt trials involving criminal conduct is recognized in 18 U.S.C. § 3691, which expressly provides a right to jury trial in federal cases where the contemptuous conduct charged constitutes "a criminal offense under any Act of Congress, or under the laws of any State in which it was done or omitted."

This case thus squarely poses the question whether the limited right to jury trial recognized in *Cheff* is (a) applicable to State trials under the Fourteenth Amendment, and (b) applicable to trials where the maximum penalty is less than six months' imprisonment but the conduct constitutes a felony under State law.

This Court has already agreed to decide these matters in *Bloom* v. *People of the State of Illinois,* October Term, 1966, No. 1070, certiorari granted April 17, 1967 (35 U. S. Law Week 3366). In *Bloom,* an attorney was found guilty of criminal contempt, after his request for a jury trial had been denied, for forging a will. Forgery is a felony under the criminal law of Illinois. The first "Question Presented", as set forth in the petition for certiorari in *Bloom* (page 2), is:

> "1. Is a defendant in a State Court trial for criminal contempt entitled under the Fourteenth Amendment to

the Constitution of the United States to a trial by jury particularly where the conduct alleged as contempt is not petty or trivial but is a felony under the law of the State."

This question arose in a rather unusual context in *Bloom*. In the instant case, it arises in the more usual setting: a criminal contempt proceeding, under an injunction issued in a labor dispute, involving conduct also proscribed by the State criminal law. Stated otherwise, the issue here is whether an employer may prosecute and imprison its striking employees, without a jury trial, for engaging in conduct which constitutes a felony and which, if prosecuted under the criminal code, would require a jury trial.

B. The second "jury trial" question presented by the decision below is whether, in a state which provides jury trials in *all* criminal cases where the defendant is subject to imprisonment, including "petty offenses", a defendant in a criminal contempt proceeding may be imprisoned for less than six months without a jury trial.

In Tennessee, the State Constitution has been construed to require a jury trial in all criminal cases, including misdemeanors, in which imprisonment, no matter how short, is an authorized sentence. *Willard* v. *State,* 174 Tenn. 645, 130 S.W.(2d) 99 (1939). This result is required, according to the Supreme Court of Tennessee, because that was the practice at the time the Tennessee Constitution was adopted.

Cheff equated right to jury trial in criminal contempt cases with the treatment of true criminal cases of comparable severity. If that holding is applied to the States through the Fourteenth Amendment, it would follow that Tennessee cannot imprison for criminal contempt without a jury trial.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

ORIGINAL OPINION OF SUPREME COURT OF TENNESSEE

TAYLOR IMPLEMENT MANUFACTURING COMPANY, INC.,
Appellee,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, ET AL,
Appellants,

This appeal comes from the Chancery Court of McMinn County, Tennessee. In that court, Wayne Dyke, Ed McKinney and John Blackwell were found guilty of criminal contempt and given the maximum sentence under T.C.A. § 23-903 of ten days in jail, plus a $50.00 fine.

This prosecution for criminal contempt arose out of an alleged violation by the three previously named persons of an injunction issued by the McMinn County Chancery Court. That injunction, arising out of a labor controversy, in pertinent part reads as follows:

> "(c) From inflicting harm or damage upon the persons or property of Complainant's employees, customers, visitors or any other persons. This includes but is not limited to the throwing of tacks or other sharp objects on the roadway or driveway;"

It was alleged that the three defendants in the contempt proceeding had fired shots at or into the home of one Lloyd Duckett, a nonstriking employee of the appellee. Evidence presented at the contempt proceeding supports this accusation.

The appellants have filed the following assignments of error in this Court:

"1. The Court erred in denying the defendants a trial by jury. See Motion for New Trial, ground No. 2 (Tr. 84) The defendants' answer demanded a trial by jury. (Tr. 74) The Court noted and denied the demand for jury trial. (Tr. 99) The defendants had a right to trial by jury by reason of Title 40, § 2504, Code of Tennessee (1956); Art. 1, § 6 of the Constitution of the State of Tennessee; and the 7th Amendment to the Constitution of the United States.

"2. The offense charged against the defendants was a crime and a felony under the laws of Tennessee and the Chancery Court is without jurisdiction to enjoin violation of the criminal laws of the State of Tennessee. See Motion for New Trial, grounds No. 3, 5, and 8. (Tr. 84-85) The facts made the basis of the charge of contempt, assuming arguendo they are true, are also violative of the Criminal Code of Tennessee and are punishable thereunder. Thus, the defendants could well have been charged with violation of, for example, Article 39, § 4901, Article 39, § 603, Article 39, § 1101, or Article 39, § 4501, of the Code of the State of Tennessee. The Chancery Courts do not exist to enforce the criminal code. The defendants were tried in a summary fashion without the Constitutional guarantees otherwise theirs. The Constitution of the State of Tennessee shows great concern for the rights of the accused. From arrest to trial to appeal, the defendant accused of a crime is protected from abuse by the State. Those defendants are entitled as a matter of right to that protection.

"3. The Court erred in admitting evidence of an air-rifle found in the automobile without a search warrant. See Motion for New Trial, ground No. 4. Sheriff Powers searched the car in question without a search warrant and testified he found a gun.

"'A. We set them on the bench there in jail. Set

them on the bench. Told them to set there on the bench and we went on back out at that time and searched the car. On the right-hand side of the front seat I taken a gun from under the front seat; stuck back under the front seat.

" 'MR. TAYLOR: We object to that.

" 'THE COURT: I overrule.

" 'MR. TAYLOR: Note out exception.

" 'Q. (By Mr. Carter) Go ahead.

" 'A. And——

" 'THE COURT: (Interposing) You might be in good shape in a Criminal Court, but this is not Criminal Court, Mr. Taylor.

" 'Q. (By Mr. Carter) Go ahead, Mr. Powers.

" 'A. I also found some ammunition in the seat where Ed McKinney was sitting for this gun.' (Tr 142-143.)

"Over objection the Court allowed the evidence noting perceptively that 'you might be in good shape in a Criminal Court, but this is not a Criminal Court, Mr. Taylor.' (Tr. 143.) The defendants were entitled to Constitutional protection (both State and Federal) from unreasonable search and seizure which was denied them by reason of the Court's assumption of criminal jurisdiction.

"4. The Court erred in permitting evidence, over the objection of defense counsel, of some type of bullet or missile which the complainant refused to offer into evidence. Sheriff Kirkpatrick was allowed to testify as to comparisons of the bullet found near the Duckett home and another bullet allegedly handed him by the sheriff of McMinn County. (Tr. 134, 135.)

"'THE COURT: Do you have the gun with you?

"'THE WITNESS: No sir. It's locked up at Madisonville.

"'THE COURT: Madisonville?

"'THE WITNESS: Yes, sir.

"'MR. TAYLOR: That's all. Come down.

"'THE COURT: Are you offering this gun and ammunition in evidence?

"'MR. CARTER: I would like to but he didn't bring it.

"'THE COURT: Let it be treated as filed and withdrawn.' (Tr. 137.)

"The defendants were deprived of the right to cross-examine in accordance with the statutes and Constitution of the State of Tennessee and the Constitution of the United States."

Appellant's first assignment of error and major contention is that the trial court erred in denying appellants a trial by jury. It is asserted that this denial violates the right to trial by jury conained in T.C.A. § 40-2504, Article 1, Section 6 of the Constitution of the State of Tennessee, and Amendment 7 of the Constitution of the United States. This assignmen of error is wholly without merit. This Court, in *Pass* v. *State* (1944) 181 Tenn. 613, 184 S.W.2d 1, has answered this question in clear and unmistakable terms, both with respect to the statutory right to jury trial in Chancery Court provided in T.C.A. § 40-2504 and right to jury trial under the Tennessee Constitution. It would serve no purpose but that of supererogation to attempt to restate the law of Tennessee in this regard, when it has been so ably and lucidly stated in the case just cited.

Likewise, that opinion takes into full account the 7th Amendment to the Constitution of the United States. It is completely clear that the result we reach in this case would

be the same under Federal jurisdiction. The United States Supreme Court decisions cited and quoted from in *Pass* v. *State,* supra, have lately been brought down to date in the opinion of that Court in *Cheff* v. *Schnackenberg* (1966) 384 U. S. 373, 16 L.Ed.2d 629, 86 S.Ct. 1523. It inevitably follows, upon consideration of those decisions, that the first assignment of error must be overruled.

Appellants' assignment of error 2 urges that the Chancery Court was without jurisdiction to issue the injunction found to be violated. The assignment is based upon the fallacy that such injunction sought to and did enjoin violation of the criminal laws of the State of Tennessee, as such. However, this is clearly not the case here. This injunction was issued (1) to protect the property and personal rights of the Taylor Implement Manufacturing Company, Inc. and its non-striking employees; and (2) to maintain an atmosphere of reasonable tranquility in which a labor dispute might be resolved. See 28 Am. Jur. 655 (Injunctions—Sec. 157). It is also the law of this State that even if the injunction were improperly issued, as contended by the appellants, they are required to obey it as long as it continues in force; and would be guilty of contempt of court if they failed to obey it. See *Nashville Corp.* v. *United Steelworkers of America, CIO* (1948) 187 Tenn. 444, 215 S.W.2d 878.

Appellants' assignment of error 3 argues that the trial court erred in admitting evidence relating to an air rifle found in appellant McKinney's automobile. It is true that such weapon was found by search of the automobile, without search warrant. The evidence contained in this record shows, however, that the search of the car was made after the appellant McKinney had been arrested for reckless driving. No question is made but that this was a lawful arrest. The question then is whether the search was reasonable or otherwise. The gun was found, according to the only evidence contained in the record, under the front seat of the automobile. It is the law of this State that, within reason-

able limits, the police may search pursuant to a lawful arrest the person and property of the person arrested for evidence of the crime for which he is arrested, and for weapons which might be utilized for resistance or escape. It is the opinion of this Court that the search here conducted was within those reasonable limits. If so, evidence of other unlawful conduct produced pursuant to a lawful search of this type is admissible in prosecution based upon such other unlawful conduct. See *Church* v. *State* (1950) 206 Tenn. 336, 333 S.W.2d 799, and *Elliott* v. *State* (1938) 173 Tenn. 203, 116 S.W.2d 1009.

Appellants' fourth assignment of error is that the trial court erred in allowing a Sheriff Kirkpatrick to testify as to comparisons he made of a projectile found near the Duckett home and another projectile allegedly given him by the Sheriff of McMinn County. The latter was taken from the car of the appellant McKinney. The main basis of objection to this testimony seems to be that these projectiles were not introduced into evidence. No authority is cited to support appellants' contention that for the court to allow Sheriff Kirkpatrick's testimony, it was necessary to introduce the projectiles into evidence. Further, the appellants fail to point out how or if they were prejudiced by the failure to enter the projectiles into evidence. This Court is of the opinion that Sheriff Kirkpatrick's testimony was admissible. Even if his testimony was not admissible, it would constitute, at most, harmless error. Here, there is no jury to be misled if, in fact, misleading testimony was given, but rather, this case was tried by a Chancellor, with knowledge of the law and the rules of evidence.

It is the opinion of this Court that, even without this evidence, sufficient evidence is contained in the record to fully justify the Chancellor's finding. Thus, an error in admitting evidence, if such were present, would not indicate reversal. See *Bowdon* v. *Bowdon* (1955) 198 Tenn. 143, 278 S.W.2d 670.

The judgment of the trial court is affirmed, with costs of this appeal assessed against the appellants.

LARRY CRESON, *Justice*

Burnett, C. J.,
Dyer and Chattin, JJ.,
Harbison, Sp. J., concur

APPENDIX B

OPINION OF SUPREME COURT OF TENNESSEE ON PETITION TO REHEAR

TAYLOR IMPLEMENT MANUFACTURING COMPANY, INC.,
Appellee,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, ET AL,
Appellants,

OPINION ON PETITION TO REHEAR

We have been presented with a petition to rehear. The petition urges that this Court overlooked some of petitioner's contentions in arriving at its earlier opinion. It is sufficient to say that all of these contentions were considered by the Court in arriving at its original opinion. This Court is under no obligation to specifically answer every question made, simply because the same is made, regardless of how obviously devoid of merit.

The petition to rehear filed in this case is simply a reargument of those issues and contentions considered by this Court in preparing its original opinion. All of these contentions and the authorities cited in support of them were given full consideration by the Court and this Court feels no necessity to again review these questions.

No new argument is made, no new authority is adduced, and no material fact is pointed out as overlooked.

The petition to rehear is denied.

LARRY CRESON, *Justice*

Burnett, C.J.,
Dyer and Chattin, JJ.,
Harbison, Sp. J., concur

SUPREME COURT, U. S. NO. [redacted] 149

JUL 10 1967

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

WAYNE DYKE, ET AL,
Petitioners,

vs.

TAYLOR IMPLEMENT MANUFACTURING COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. 1378

WAYNE DYKE, ET AL,
Petitioners,

vs.

TAYLOR IMPLEMENT MANUFACTURING COMPANY, INC.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Tennessee is reported at 410 S.W. 2d 881 (1967).

JURISDICTION

The basis of this Court's jurisdiction, as asserted by petitioners, is 28 U.S.C. § 1257; however, for the reasons hereinafter set out respondent avers that the Court lacks jurisdiction to consider Questions 3 and 4 raised in the "Petition for Writ of Certiorari to the Supreme Court of Tennessee".

QUESTIONS PRESENTED

1. Was the search of the automobile in which petitioners were riding at the time of their arrest and the seizure of a rifle found therein reasonable in view of all the facts developed in the record?

2. If evidence was improperly admitted by the trial court, is there other sufficient evidence in the record to justify the findings of the trial court?

3. Were Questions 3 and 4 presented in the "Petition for Writ of Certiorari to the Supreme Court of Tennessee" properly raised in the state court proceedings or considered and determined by the state court?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the State of Tennessee:

Article 1, Section 6. "That the right of trial by jury shall remain inviolate . . . ."

28 U.S.C. §1257:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

". . . (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

STATEMENT OF THE CASE

Respondent is satisfied with the statement of counsel for petitioners except as follows:

(1) The petitioners were indicted in Monroe County, Tennessee.

(2) There was ample evidence to justify the Chancellor's decree in addition to the rifle and ammunition found in the automobile, which linked the petitioners to the shooting in the adjoining County, thereby violating the Court's injunction. Specifically, witnesses Dale Harris and Robert Ellis identified the automobile in which petitioners were arrested shortly after the shooting episode as being the same automobile from which the shot in question was fired (R. 110, 113, 117-121).*

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* As used in this brief, "R" refers to Volume I of the Record prepared by the Supreme Court of Tennessee.

ARGUMENT

(1) THE SEARCH OF THE AUTOMOBILE IN WHICH PETITIONERS WERE RIDING AT THE TIME OF THEIR ARREST AND SEIZURE OF A RIFLE FOUND THEREIN WAS REASONABLE IN VIEW OF ALL THE FACTS DEVELOPED IN THE RECORD.

The petitioners contend that error was committed in allowing certain evidence to be introduced concerning a rifle found in the automobile in which petitioners were riding in contravention of their rights under the Fourth and Fourteenth Amendments of the Constitution of the United States.

Conceding for the purpose of discussion that illegally seized evidence cannot be used to convict one charged with a contempt, still this rule would have no application to the facts of this case. The evidence which petitioners charge was illegally obtained relates solely to the rifle. As will be shown, the search which uncovered this weapon was reasonable and therefore not in violation of the constitutional guaranties against unreasonable searches and seizures.

Lloyd Powers, a McMinn County deputy sheriff, testified that on the night of February 25, 1966, he was patrolling in a patrol car when he heard a call come in over a two-way radio from the Sheriff of Monroe County that there had been a shooting in a house in Monroe County and to be on the lookout for an "old-make model car". As Powers drove toward Englewood, Tennessee, a town in McMinn County but near the Monroe County Line, in

response to this call, he met three cars. The first car was "an old model car." Powers turned around and chased this car to see if it was the one that was being sought. Within about one mile he passed the other two cars, but he was not able to catch the first car — "It was running at a high speed, high rate of speed." (Tr. p. 52). Being unable to overtake this car, Powers radioed into the Athens City Police, who stopped the speeding car. Powers arrived before the three occupants, who he identified as the petitioners herein, got out of the car.

While talking to the petitioners at their car, Powers discovered a bullet hole in the back of the car. The driver, petitioner McKinney, stated that the bullet hole had been there for a long period of time. This was obviously contrary to Power's own observation for he testified:

> "At that time we seen the bullet hole was just a fresh hole. Been a fresh hole, see. Wasn't even no rust spot or anything. Fresh hole through the body of the car, and —" (Tr. p. 53).

If the freshly formed bullet hole had not been discovered in the rear of petitioners' automobile, the contention that the subsequent search of the car was unreasonable after the driver had been arrested only for reckless driving might have merit.

However, the undisputed testimony in this case is that the bullet hole in the rear of the car was fresh. Sheriff Calvin Cannon of McMinn County testified as follows:

> "I went out and looked at the automobile and checked it and found that a bullet or— had entered into the trunk of the automobile and picked up the fragment of the bullet. It hit the frame after it

went through and also a tool box and, of course, there was the fresh lead, real bright—" (Tr. p. 59).

Upon cross-examination Sheriff Cannon stated that in his opinion the bullet hole had to have been made that night (Tr. p. 59).

The discovery of the bullet hole was not the result of any unlawful search. Indeed, it is not even a "search" to observe that which is fully disclosed by mere visual observation. *United States v. Lee*, 274 U.S. 559, 563.

Detecting the bullet hole involved no search, but the important thing is that it aroused suspicion in the minds of the officers in view of the information of a shooting episode received shortly before and in view of the fact that the petitioners had attempted to mislead the officers by saying that the hole had been there for a long period of time. More important it showed that the automobile had been involved in a shooting episode recently.

The constitutional guaranties extend only to unreasonable searches. A search without a warrant is reasonable if probable cause exists for it.

> "Probable cause necessarily is often based upon what an officer is told, as well as upon what he perceives through his own senses. It exists where facts and circumstances within an officer's knowledge, and of which he had reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302; *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790." *United States v. Roberts*, 90 F. Supp. 718, 720.

The search of the automobile in this case was not based solely upon the officers' information that an old model car had been involved in a shooting in Monroe County, but also upon the officer's efforts to catch a fleeing automobile, the observation of the fresh bullet hole which tended to show that the automobile was recently involved in a shooting episode plus the statement by one of the petitioners that the hole had been there a long time, which fact was obviously contradicted by visual inspection.

Having reasonable cause to believe that a crime had been committed and that the petitioners were involved in its commission, it is submitted, that the subsequent search of the automobile was proper.

---

(2) THERE WAS SUFFICIENT EVIDENCE, OTHER THAN THAT ASSERTED TO BE INADMISSABLE, TO JUSTIFY THE FINDINGS OF THE TRIAL COURT.

Assuming arguendo that the evidence which was found in the automobile in which petitioners were riding was improperly admitted, this within itself is not a ground for reversal for punishment for contempt of court. *Bowden v. Bowden*, 198 Tenn. 143, 147; *Sinclair v. United States*, 279 U.S. 749. In the latter case at page 768 this Court said:

"Objections are offered to the admission of certain evidence. In answer, we need only refer to what

was said in *United States v. King*, 7 How. 833, 854, 855, 12 L. ed. 934, 944: 'In some unimportant particulars, the evidence objected to was not admissable. But where the court decides the fact and the law without the intervention of a jury, the admission of illegal testimony, even if material, is not of itself a ground for reversing the judgment, nor is it properly the subject of a bill of exceptions. If evidence appears to have been improperly admitted, the appellate court will reject it, and proceed to decide the case as if it was not in the record.

"Considering the whole record, we think appellants had a patient hearing upon adequately defined issues, with abundant opportunity to put forward all proper defenses and explanations. With, the exception already stated, there is ample evidence to support the judgment; the punishments imposed are not excessive; the court kept within the limits of its reasonable discretion and did nothing which injuriously affected the substantial rights of the parties. Judicial Code, § 269, U.S.C. title 28, § 391."

In this case there is ample evidence to sustain the conviction for contempt other than the evidence alleged by the petitioners to be inadmissible. The Supreme Court of Tennessee in passing on the weight of the evidence expressly so held in its opinion at 410 S.W. 2d 881, 885:

"It is the opinion of this Court that, even without this evidence, sufficient evidence is contained in the record to fully justify the Chancellor's finding."

Furthermore, it is well settled that the Supreme Court will not review findings of fact by a state court where there is evidence to support those findings. Accordingly,

the respondent respectfully submits that this Court is bound by the Tennessee Supreme Court's decision in regard to the record containing sufficient evidence, other than that alleged by petitioners to be inadmissible, to support the findings of the Chancellor.

---

(3) THE FEDERAL QUESTIONS PERTAINING TO PETITIONERS' RIGHT TO A JURY TRIAL RELIED UPON IN THIS COURT ARE NOT THE SAME AS THOSE RAISED OR CONSIDERED AND DETERMINED IN THE STATE COURT.

The jurisdiction of the Supreme Court in this case is based upon the third section of 28 U.S.C. § 1257; however, under this statute the Supreme Court's review is limited to the specific federal questions that were either properly raised in the state court or actually considered and determined by it. *Whitney v. California*, 274 U.S. 375, 360-363; *Dewey v. Des Moines*, 173 U.S. 193, 197-198.

> "It is well settled that this Court, on error to a state court, cannot consider an alleged Federal question, when it appears that the Federal right thus relied upon had not been by adequate specification called to the attention of the State court and had not been by it considered, not being necessarily involved in the determination of the cause." *City Dairy Co. v. Ohio*, 183 U.S. 238, 248.

Upon appeal to the Supreme Court of Tennessee the petitioners made the following assignment of error:

> "1. The Court erred in denying the defendants a trial by jury. See Motion for New Trial, ground No. 2 (Tr. 84). The defendants' answer demanded a trial by jury (Tr. 74). The Court noted and denied the demand for jury trial (Tr. 99). The defendants had a right to trial by jury by reason of Title 40, § 2504, Code of Tennessee (1956); Art. 1, § 6, of the Constitution of the State of Tennessee; and the 7th Amendment to the Constitution of the United States."

Petitioners now contend for the first time that an alleged contemnor is entitled to a jury trial under the Fourteenth Amendment to the United States Constitution where the alleged contemptuous conduct amounts to a felony and where under state law a jury is required in every criminal case in which imprisonment may result. These are very different issues from that embraced in the assignment of errors and argued before the state supreme court.

The Seventh Amendment, cited by petitioners in their first assignment of errors in the state court, preserves the right to a jury trial as it existed at common law in certain cases tried in the federal courts and does not apply to trials in state courts. *Walker v. Sauvinet*, 92 U.S. 90. Indeed, no provision of the Federal Constitution expressly guarantees the right to a trial by jury in any case, criminal or civil, triable in the state courts. Furthermore, "the commandments of the Sixth and Seventh Amendments, which require jury trial in criminal and certain civil cases, are not picked up by the due process clause of the Fourteenth so as to become limitations on the states. 'This court has ruled that con-

sistently with those amendments trial by jury may be modified by a state or abolished altogether.' (citation omitted)" *Fay v. New York*, 332 U.S. 261, 288.

Clearly, petitioners were relying primarily, if not solely, upon the Tennessee Constitution and state statutes in claiming that the Chancellor erred in denying their demand for a jury trial, for the Seventh Amendment was in no way pertinent to the case.

A party is not required to use any particular form of words or phrases in framing the federal question presented before the state court. It is only necessary "that the claim of invalidity and the ground therefor be brought to the attention of the State court with fair precision and in due time, and if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *Bryant v. Zimmerman*, 278 U.S. 63, 67.

In other words, the record must clearly indicate that the party seeking to invoke the jurisdiction of this Court duly sought to rely upon a particular provision of the Constitution or act of Congress. The federal issue upon which a litigant seeks Supreme Court review must have been clearly and positively presented so as to bring it unmistakenly to the attention of the state court; it cannot be left to mere inference. *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655. "It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a Federal nature." *Dewey v. Des Moines*, *supra*, p. 199.

The sole federal question raised by petitioners' first assignment of error in the Tennessee Supreme Court related to whether or not under the Seventh Amendment petitioners were entitled to a jury trial in a criminal

contempt case. Indeed, there was no mention of the Sixteenth Amendment in the first assignment of error. The reference to the Seventh Amendment, however, will not support the issues which, for the first time, petitioners seek to raise before this Court. In *Chapin v. Fye*, 179 U.S. 127, the Court held that issues raised in the state proceedings under the Fifth Amendment and Seventh Amendment of the Federal Constitution would not support an argument in the Supreme Court based upon the due process clause of the Fourteenth Amendment.

Considering only the questions before it, the Tennessee Supreme Court properly held that the Seventh Amendment does not require a state to grant jury trials in contempt cases. Since petitioners neither set up in the record the jury issues relating to the Fourteenth Amendment which they now raise or in any way alluded to them, it cannot be said that they were "brought to the attention of the state court with fair precision." Nor can it be said that the state court denied the claims now made by petitioners. "A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it." *Dewey v. Des Moines*, *supra*, p. 200.

Since the federal jury issues upon which review is now sought were neither raised by petitioners in the state proceedings nor in any way considered or decided by the state court, the Supreme Court lacks jurisdiction to consider them.

(4) PETITIONERS ARE NOT ENTITLED TO A JURY TRIAL UNDER THE FOURTEENTH AMENDMENT.

Petitioners do not indicate which clause of the Fourteenth Amendment they rely upon in regard to the jury questions upon which review is sought.

Assuming for the sake of discussion that the jury questions upon which review is sought were properly raised in the state court, the provisions of the Fourteenth Amendment would not afford petitioners the right to a jury trial in this case.

As previously noted, nothing in the Federal Constitution specifically requires a trial by jury in state courts, and a state can alter or abolish its jury system altogether without doing violence to the Constitution. The due process clause of the Fourteenth Amendment does not make the Sixth and Seventh Amendments applicable to state proceedings. *Fay v. New York, supra.*

Since the Sixth and Seventh Amendments are limitations upon the federal government only and not upon the states, the right to a jury trial cannot be said to be "a privilege or immunity of national citizenship, which the states are forbidden by the Fourteenth Amendment to abridge." *Walker v. Sauvinet, supra*, p. 92.

Furthermore, the equal protection clause of the Fourteenth Amendment does not require uniformity of procedure. The state may classify litigation and make different arrangements for the procedure governing trials within the classes. All that is required by the equality clause is that the classification be reasonable and that the law operates alike upon all members of the class under

similar circumstances and conditions. 16 Am. Jur. 2d, *Constitutional Law*, § 536, pp. 925-926. Thus, it has been held that the equal protection of the laws is not denied by a state statute abridging the right of trial by jury in the courts of a city without making a similar provision for the counties of the state. *Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co.*, 172 U.S. 474.

The fact, that under Tennessee law an alleged contemnor is not entitled to a jury trial even though he would be entitled to such upon a criminal indictment arising out of the same acts as constituted the alleged contemptuous conduct, does not violate the equal protection clause of the Fourteenth Amendment.

The classification between non-jury trials in contempt proceedings and jury trials for violations of the criminal code of the state is reasonable. It is a classification sanctioned both at common law and under modern practice. *Cheff v. Schnackenbert*, 384 U.S. 373. No where do petitioners suggest that as members of the class of alleged contemnors the Tennessee law regarding the right of jury trial operates differently upon them than upon some other members of the same class. All alleged contemnors are treated equally in the denial of the right of a jury trial.

Petitioners maintain that in *Cheff* the Court equated the right to a jury trial in contempt cases with the nature of the criminal offense constituting the contemptous conduct. While this may be the position expressed by Mr. Justice Douglas in dissenting, respondent respectfully suggests that the majority opinion held merely that, regardless of the nature of the offense, a jury trial must be afforded in contempt cases in the federal courts only where the sentence imposed is greater than six months. Thus, to

apply *Cheff* to the states through the Fourteenth Amendment, as petitioners urge, would not effect the result in this case, for the contempt sentence was limited to 10 days imprisonment and a $50.00 fine, this being the maximum punishment for contempt under Tennessee law. See *Tennessee Code Annotated*, § 23-903.

The fourth question presented in petitioners' brief assumes that the Constitution of the State of Tennessee requires a jury trial in every criminal case in which imprisonment may result. First, it should be noted that a contempt proceeding is only a "quasi-criminal" proceeding. Secondly, the case of *Willard v. State*, 174 Tenn. 645, 130 S.W. 2d 99, relied upon in support of petitioner's contention under the fourth question presented holds ". . . that this constitutional provision (referring to Article 1, Section 6 of the Tennessee Constitution) protects the right of trial by jury *only as it existed at common law* . . . (emphasis supplied)." Thirdly, the Tennessee Supreme Court has ruled that "a defendant was not entitled to a jury trial in contempt proceedings in any Court at common law." *Pass v. State*, 181 Tenn. 613, 618, 184 S.W. 2d 1. Since the fourth question presented involved the interpretation of the state constitution alone, the question is resolved by the judgment of the Tennessee Supreme Court. *Walker v. Sauvinet*, *supra*, p. 92.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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July 7, 1967

AFFIDAVIT OF SERVICE

I, S. Randolph Ayres, of counsel for the Respondent, being first duly sworn according to law, depose and say:

Pursuant to Rule 33, Paragraph 3(c), of the Supreme Court of the United States, I have this ..... day of July, 1967, served a true and exact copy of the foregoing Brief for Respondent in Opposition upon Bernard Kleiman, 10 South LaSalle Street, Chicago, Illinois, Elliot Bredhoff and Michael Gottesman, 1001 Connecticut Avenue, N.W., Washington, D. C., and George Longshore, of Cooper, Mitch & Crawford, 1025 Bank of Savings Building, Birmingham, Alabama, by depositing same in the United States Post Office or mail box, with first class air mail postage prepaid, addressed to said counsel at their respective addresses.

.....
S. RANDOLPH AYRES

Sworn to and subscribed before me
this ..... day of July, 1967.

.....
Notary Public

My Commission Expires: .....

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No. 149

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IN THE

Supreme Court of the United States

October Term, 1967

WAYNE DYKE, ED McKINNEY AND JOHN BLACKWELL,
Petitioners,

v.

TAYLOR IMPLEMENT MANUFACTURING COMPANY, INC.

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IN THE

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WAYNE DYKE, ED MCKINNEY AND JOHN BLACKWELL,
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TAYLOR IMPLEMENT MANUFACTURING COMPANY, INC.

REPLY BRIEF FOR PETITIONERS

1. Respondent contends (Brief in Op. 7-9) that the court below relied upon an independent state ground in disposing of the "search and seizure" issue: that there was sufficient evidence to convict even without the fruits of the search. This contention is misplaced for two reasons.

(a) Respondent has misread the opinion below. The court below did not find sufficient evidence to convict absent the seized gun and bullets.

The "search and seizure" issue was "assignment of error 3" in the court below. In its disposition of that issue (Appendix to petition, pp. 21-22), the court below nowhere indicated that there was sufficient other evidence to convict. Indeed, it is perfectly clear that, without the unlawfully seized gun and bullets, there was *no* evidence linking petitioners to the shooting. The court below *could* not (as in fact it *did* not) find that there was other evidence sufficient to convict.

The language to which respondent points appears in the court below's disposition of "assignment of error 4." That issue involved the admissibility under State law of certain expert ballistics testimony. (Because it was solely a State ground, that issue is not advanced to this Court.) It was with respect to this ballistics evidence that the court below said "even without this evidence, sufficient evidence is contained in the record to fully justify the Chancellor's finding" (Appendix to petition, p. 22).

Thus, contrary to the brief in opposition, the court below did *not* rely upon the sufficiency of the remaining evidence in disposing of the "search and seizure" issue.

(b) Moreover, even if the court below *had* so relied, its decision would still be reviewable by this Court. Whether the introduction of evidence obtained by means of a Constitutional violation constitutes harmless error is itself a federal question, ultimately determinable by this Court. *Chapman* v. *California,* 386 U.S. 18 (1967). It is clear, we think, that in this case the admission of the illegally seized evidence prejudiced petitioners; indeed, as we have noted, without the gun and bullets there was no substantial evidence linking petitioners to the shooting.

2. Respondent advances only one argument to support the *correctness* of the decision below on the search and seizure issue: that there was "reasonable cause" to believe that petitioners were involved in the shooting (Brief in Op. 4-7). The simple answer is that that was not the basis for the decision below. The court below justified the search solely as incident to a lawful reckless driving arrest:

> "It is the law of this State that, within reasonable limits, the police may search *pursuant to a lawful arrest* the person and property of the person arrested for evidence of the crime for which he is arrested, and for weapons which might be utilized for resistance or escape. It is the opinion of this Court that the search here conducted was within those reasonable limits. If

> so, evidence of *other unlawful conduct* produced pursuant to a lawful search of this type is admissible in prosecution based upon such other unlawful conduct." (Appendix to petition, pages 21-22; emphasis supplied.)

In any event, as we showed in the petition (page 10), the search in the circumstances of this case contravened controlling decisions of this Court, whether viewed as incident to the arrest or as based on probable cause.

3. Respondent asserts that the jury trial claim, based on the Fourteenth Amendment, is not properly here because petitioners phrased their claim in the court below in terms of the jury trial provisions of the Bill of Rights, rather than the Fourteenth Amendment (Brief in Op. 9-12). While an early decision of this Court held that reference to a Bill of Rights provision, rather than to the Fourteenth Amendment, would preclude review of the latter issue, *Chapin* v. *Fye*, 179 U.S. 127 (1900), that decision has been widely criticized, and a more liberal policy appears to have governed more recent decisions of this Court. *Braniff Airways* v. *Nebraska State Board*, 347 U.S. 590, 598-99 (1954); *Gibbs* v. *Burke*, 337 U.S. 773, 779 (1949). See also Stern and Gressman, *Supreme Court Practice* 83 (2d Ed. 1954); Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland ed.) 149 *et. seq.* (cited with approval in *Braniff Airways, supra*).

This Court's increasing equation of Fourteenth Amendment rights with those of the first eight Amendments has led to a widespread practice of discussing state-action cases in terms of the first eight Amendments. See, e.g., *Stoner* v. *California*, 376 U.S. 483, 488 (1964); *Ker* v. *California*, 374 U.S. 23, 30-34; *Bond* v. *Floyd*, 385 U.S. 116, 131-37 (1966); *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967).

While, to be sure, it would have been better practice to refer specifically to the Fourteenth Amendment below, it is clear that in this case, at least, the State court fully under-

stood that petitioners were not relying literally on the Bill of Righs to the exclusion of the Fourteenth Amendment. The court below did not reject the federal Constitutional claim on the ground that the Bill of Rights is applicable only to federal courts (as respondent suggests, Brief in Op. 12). Rather, the court below declared: "It is completely clear that the result we reach in this case would be the same under Federal jurisdiction" (Appendix to Petition, pp. 20-21).

Accordingly, the contention that the denial of jury trial violated the Fourteenth Amendment was adequately raised in the State courts, was passed upon, and is properly here.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, certiorari should be granted.

Respectfully submitted,

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SUPREME COURT, U. S. No. 149

NOV 8 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

WAYNE DYKE, ED MCKINNEY AND JOHN BLACKWELL,
Petitioners,

v.

TAYLOR IMPLEMENT MANUFACTURING COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF FOR PETITIONERS

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IN THE

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No. 149

WAYNE DYKE, ED MCKINNEY AND JOHN BLACKWELL,
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Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF TENNESSEE

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee, — Tenn. —, 410 SW 2d 881, was entered on November 14, 1966. The opinion is reproduced in the Joint Appendix (p. 41). The opinion on Petition to Rehear (— Tenn. —, 410 SW 2d at 885) was entered on February 10, 1967, and is reprinted in the Joint Appendix at p. 47.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Tennessee was entered on November 14, 1966. A timely petition for rehearing was filed, and was denied on February 10, 1967. Certiorari was granted on October 9, 1967. The jurisdiction of this Court is founded upon 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Was the following described search and seizure conducted in contravention of petitioners' rights under the Fourth and Fourteenth Amendments to the Constitution of the United States:

> Petitioners were apprehended on an open highway and arrested for reckless driving. They, and their car, were taken to the county jail. While petitioners were detained inside the jail on the reckless driving charge, police officers, without a warrant, went outside, searched the car, and found and seized a gun located beneath the front seat.

2. Does the introduction of materials obtained by an unconstitutional search and seizure into evidence in a State court trial for criminal contempt contravene the Fourteenth Amendment to the Constitution of the United States?

3. Is a defendant in a State court trial for criminal contempt entitled under the Fourteenth Amendment to the Constitution of the United States to a trial by jury, where the conduct alleged as contempt (firing a rifle into an occupied house) is not petty or trivial but is a felony under the law of the State and is punishable by imprisonment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States:

Amendment IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by

an impartial jury of the State and district wherein the crime shall have been committed, * * *."

Amendment XIV| "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 23, Tennessee Code Annotated

Section 902. Scope of power—The power of the several courts to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases:

> (3) "* * * The wilful disobedience or resistance of any . . . party . . . or any other person, to any lawful writ, process, order, rule, decree, or command of said courts.

Section 903. Punishment—The punishment for contempt may be by fine, or imprisonment, or both; but where not otherwise specially provided, the circuit, chancery, and appellate courts are limited to a fine of fifty dollars ($50.00), and imprisonment not exceeding ten (10) days . . ."

Title 39, Tennessee Code Annotated:

Section 601. "Assault with deadly weapon—Penalty.—If a person assaults and beats another with a cowhide, stick, or whip, having at the time in his possession a pistol or other deadly weapon, with intent to intimidate the person assaulted, and prevent him from defending himself, he shall, on conviction, be imprisoned in the penitentiary not less than two (2) years nor more than ten (10) years."

Section 603. "Assault with intent to commit felony—Attempt to commit felony—Penalty.—If any person assault another, with intent to commit, or otherwise attempt to commit, any felony or crime punishable by imprisonment

in the penitentiary, where the punishment is not otherwise prescribed, he shall, on conviction, by punished by imprisonment in the penitentiary not exceeding five (5) years, or, in the discretion of the jury, by imprisonment in the county workhouse or jail not more than one (1) year, and by fine not exceeding five hundred dollars ($500)."

Section 613. "Shooting or throwing missile calculated to produce death or bodily harm—Penalty.—Any person who wantonly or maliciously either shoots, or throws any missile calculated to produce death or great bodily harm, at or into any dwelling or any other house which is being used or occupied . . . shall be declared guilty of a felony, and, upon conviction, shall undergo confinement in the penitentiary for a period not less than one (1) year nor more than five years."

STATEMENT OF THE CASE

The employees of Taylor Implement Manufacturing Company, Inc., in Athens, McMinn County, Tennessee, chose the United Steelworkers of America, AFL-CIO, as their collective bargaining representative. The Union was certified by the National Labor Relations Board on September 20, 1965

Negotiations for a contract were unavailing and a legal strike began on January 12, 1966. Petitioners were employees who participated in the strike.

The Company sought and obtained a state court injunction, from the Chancellor of the McMinn County Equity Court, which enjoined the Union and its striking members:

> "(c) From inflicting harm or damage upon the person or property of Complainant's employees, customers, visitors, or any other persons. This includes but is not limited to the throwing of tacks or other sharp objects on the roadway or driveway;" (J.A. 1-2).

On February 25, 1966, a shot was fired from a 1960

Dodge automobile into the home of a nonstriking employee who lived in a neighboring county, Monroe County, about 25 miles from the struck plant (J.A. 3). McMinn County police received a report on their car radio that the shooting had occurred, and that the automobile involved was an "old make model car" (J.A. 27).

Shortly thereafter, McMinn County police observed "kinda an old model car", with its right tail-light out, speeding down a highway (J.A. 28). They stopped the car, observed a bullet-hole in the trunk, and arrested the occupants (petitioners) for reckless driving (J.A. 28-30). Petitioners were taken to the county jail (J.A. 30), and the car —owned by petitioner McKinney — was towed to and parked outside the county jail (J.A. 17). While petitioners were detained inside the jail on the reckless driving charge, and after McKinney had announced that he was going to leave his car (J.A. 17), police officers, without obtaining a warrant, went outside and searched the car (J.A. 30). Their search uncovered an air rifle and ammunition (J.A. 30).

Petitioners were never criminally tried for the shooting in Monroe County. However, on March 14, 1966, the Company filed a "Petition for Attachment for Contempt" in the McMinn County Equity Court, alleging that petitioners had fired the shot, and that their doing so violated the injunction against "inflicting harm or damage upon the persons or property of Complainant's employees." More specifically, the petition alleged:

> "On or about February 25, 1966, at approximately 11 p.m. while Lloyd Duckett, a nonstriking employee of the complainant, was at his home located in Monroe County, Tennessee, along with four members of his family, an automobile drove to his premises from which a shot was fired into his home. Thereupon the fleeing car in question was pursued, identified, and caught. It was found that the three occupants of the car were

John Blackwell and the defendants Wayne Dyke and Ed McKinney, all three of whom are striking employees of the complainant and members of the defendant Union. The said Wayne Dyke is the elected president of the local group of the defendant Union. A rifle of the type which fires a projectile of the sort found at the Duckett home was discovered in the car at the time of the apprehension and arrest of the said three striking employees." (J.A. 3.)

Defendants pleaded not guilty, and demanded a jury trial (J.A. 5, 8). The Chancellor refused to provide them a jury trial (J.A. 8). They were tried by the Chancellor on March 22, 1966.

The only evidence linking defendants to the shooting in the adjoining county was the evidence obtained by searching the car. Deputy Sheriff Powers testified that defendants were arrested for reckless driving (J.A. 30); that they were brought to the county jail (J.A. 30); and that while there detained their automobile was searched and the evidence uncovered:

"A. We set them on the bench there in jail. Set them on the bench. Told them to set there on the bench and went on back out at that time and searched the car. On the right-hand side of the front seat I taken a gun from under the front seat; stuck back under the front seat.

"MR. TAYLOR: We object to that.

"THE COURT: I overrule.

"MR. TAYLOR: Note our exception.

"Q. (By Mr. Carter) Go ahead.

"A. And——

"THE COURT: (interposing) You might be in good shape in a Criminal Court, but this is not Criminal Court, Mr. Taylor.

"Q. (By Mr. Carter) Go ahead, Mr. Powers.

"A. I also found some ammunition in the seat where Ed McKinney was sitting for this gun" (J.A. 30).

The defendants were convicted and given the maximum punishment authorized, 10 days in jail and a $50.00 fine, Tennessee Code Annotated, Title 23, Section 903. (J.A. 4).

Defendants appealed to the Supreme Court of Tennessee, on the grounds, *inter alia,* that the denial of jury trial and the admission of the materials obtained from the search of the car violated their rights under the Constitution of the United States (J.A. 39-40).

On November 14, 1966, the Supreme Court of Tennessee denied the appeal. On the jury trial issue, the Court merely recited that the federal Constitution does not require a jury trial (J.A. 44). On the search and seizure issue, the Court found the search lawful:

> "Appellants' assignment of error 3 argues that the trial court erred in admitting evidence relating to an air rifle found in appellant McKinney's automobile. It is true that such weapon was found by search of the automobile, without search warrant. The evidence contained in this record shows, however, that the search of the car was made after the appellant McKinney had been arrested for reckless driving. No question is made but that this was a lawful arrest. The question then is whether the search was reasonable or otherwise. The gun was found, according to the only evidence contained in the record, under the front seat of the automobile. It is the law of this State that, within reasonable limits, the police may search pursuant to a lawful arrest the person and property of the person arrested for evidence of the crime for which he is arrested, and for weapons which might be utilized for resistance or escape. It is the opinion of this Court that the search here conducted was within those reasonable limits. If so, evidence of other unlawful con-

duct produced pursuant to a lawful search of this type is admissible in prosecution based upon such other unlawful conduct. (J.A. 45).

Defendants petitioned for rehearing, again asserting that on both issues their federal Constitutional rights had been denied. The petition for rehearing was denied on February 10, 1967 (J.A. 47).

Defendants' federal claims were asserted at all stages of the state proceedings. See, e.g. J.A. 8, 30, 32, 39-40.

SUMMARY OF ARGUMENT

I. THE SEARCH OF THE CAR WITHOUT A WARRANT CONTRAVENED THE FOURTH AND FOURTEENTH AMENDMENTS

A. As this Court has often acknowledged, its decisions as to when a search without warrant is "reasonable" are in irreconcilable conflict. It is imperative that the Court now enunciate a viable rule of general application, for the existing turmoil visits incalculable harm upon both law enforcement and the citizenry.

In large part, the existing confusion has been caused by a two-decade debate between competing conceptions of the Fourth Amendment. One view, typified by *McDonald v. U.S.*, 335 U.S. 451 (1948), is that a search without warrant is never permitted except where the "exigencies of the situation" preclude the delay necessary to obtain a warrant. The other view, typified by *U.S. v. Rabinowitz*, 339 U.S. 56 (1950), is that the reasonableness of a search without warrant must be judged on the facts and circumstances of each case, and the mere fact that there is time to obtain a warrant does not automatically invalidate a search without one. Until 1967, this split affected the Court's holdings in only one area: the extent to which a warrantless search might be conducted "incident to an arrest." However, with

Cooper v. *California*, 386 U.S. 58 (1967), holding that it is "reasonable" to search a car impounded as evidence in a forfeiture proceeding, the debate has taken on a new dimension and importance, for the *Rabinowitz* view has now been expanded for the first time into new fields.

We believe the *Rabinowitz* approach is inherently destructive of the purposes the Fourth Amendment is intended to serve. By making "reasonableness" turn on the facts of each case, *Rabinowitz* virtually guarantees that police officers will be incapable of understanding the limits of their authority, and that they will, therefore, engage in unlawful searches. (The repeated splits within this Court over what is "reasonable" prove the unmanageability of the *Rabinowitz test*). By contrast, the *McDonald* test is one which police officers can understand and apply. In each case, the officer need only ask: "Do I have time to obtain a warrant?"

Moreover, the *McDonald* rule more accurately fulfills the essential purpose of the Fourth Amendment: interposition of a judicial officer between the policeman and the citizen's privacy. It assures an independent judicial appraisal in all cases where considerations of time do not preclude it. And it does so with no harm to the interests of law enforcement, for it is precisely where those interests preclude obtaining a warrant that *McDonald* authorizes a warrantless search. We urge, accordingly, that this Court declare *McDonald* the test of reasonableness for all warrantless searches.

If *McDonald* is the governing rule, the search here was unlawful, for "the exigencies of the situation" did not preclude obtaining a warrant. Petitioners were under custody inside the county jail; their car had been towed and parked outside the jail; and petitioner McKinney—the car's owner—had announced that he was going to leave it. There was, therefore, ample time to secure a warrant.

B. Even if this Court adheres to *Rabinowitz*, and therefore determines "reasonableness" on a case-by-case basis, it

must conclude that the search here was unreasonable. The facts and circumstances here are virtually identical to those in *Preston* v. *U.S.*, 376 U.S. 364 (1964). The invalidation of the search in *Preston* dictates the same result here. Nothing in *Cooper* v. *California, supra,* detracts from the applicability of *Preston* here. As the Court made clear in *Cooper,* its decision was premised on the unique factors—absent in *Preston* and here—that the car had been impounded, subject to forfeiture, as evidence of the very crime for which its owner was arrested. Here, as in *Preston,* the car was not impounded, it was not subject to forfeiture, and it was not evidence of the crime (reckless driving) for which petitioners were arrested.

C. The exclusionary rule applies to criminal contempt proceedings. This Court has already held it applicable to forfeiture proceedings, *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693 (1965), on the ground that forfeiture is a "quasi-criminal" proceeding. Criminal contempt is at least a "quasi-criminal" proceeding. *A fortiori,* if the exclusionary rule protects against forfeiture of automobiles, it must protect against forfeiture of liberty.

II. PETITIONERS WERE ENTITLED TO A JURY TRIAL

The denial of a jury trial to petitioners in the state court criminal contempt proceeding contravened the Sixth Amendment to the Constitution as applied to the States by the Fourteenth Amendment. Irrespective of whether all criminal contempts constitute "criminal prosecutions" within the meaning of the Sixth Amendment, it is self-evident that the instant proceeding in which the alleged act of contempt itself constituted a serious felony under state law (shooting bullets into a home with intent to kill or inflict bodily harm) was tantamount to a criminal prosecution and, therefore, petitioners were entitled to a jury trial. Cf. *Cheff* v. *Schnackenberg,* 384 U.S. 373 (1966). Just as the

question whether a defendant accused of a crime is entitled to a jury trial depends primarily upon the nature of the offense where the potential sentence is small (*District of Columbia* v. *Colts,* 282 U.S. 63 (1930); *Callan* v. *Wilson,* 127 U.S. 540 (1888)), so too the same test should apply to criminal contempt proceedings.

Further, since the right to trial by jury in any such criminal prosecution is one of the fundamental guarantees contained in the Bill of Rights it is likewise obligatory upon the States under the Fourteenth Amendment. *Pointer* v. *Texas,* 380 U.S. 400 (1965); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963).

ARGUMENT

I.

THE SEARCH OF THE CAR WITHOUT A WARRANT CONTRAVENED THE FOURTH AND FOURTEENTH AMENDMENTS.

The search of the automobile in this case was conducted in circumstances indistinguishable from those in *Preston* v. *U.S.,* 376 U.S. 364 (1964) and we show in Part B herein that the invalidation of the search in *Preston* requires a similar ruling here.

We believe, however, that this case should not be decided on so narrow a ground. As we show in Part A, it is imperative that this Court enunciate a viable standard for measuring the validity of all warrantless searches. This case presents an appropriate opportunity to do so.

A. A Search Without A Warrant is Valid Only Where "The Exigencies of the Situation" Make it Impracticable to Obtain a Warrant

1. *The Need for a Viable Rule of General Application*

For two decades, the standards governing the "reasonableness" of searches without warrants have been in a state

of turmoil. It is imperative—for the interests of law enforcement and the citizenry alike—that a clear standard of general application be adopted by this Court.

That turmoil exists has been readily acknowledged by this Court. "The several cases on this subject in this Court cannot be satisfactorily reconciled. This problem has, as is well known, provoked a strong and fluctuating difference of view on the Court," *Abel* v. *U.S.*, 362 U.S. 217, 235 (1960). "The course of true law pertaining to searches and seizures, as enunciated here, has not—to put it mildly—run smooth." *Chapman* v. *U.S.*, 365 U.S. 610, 618 (concurring opinion of Mr. Justice Frankfurter). "For some years now the field has been muddy . . ." *Id.* at 622 (dissenting opinion of Mr. Justice Clark). "[A]s to the substantive rule governing federal searches in violation of the Fourth Amendment, both the Court and individual Justices have wavered considerably." *Irvine* v. *California*, 347 U.S. 128, 134 (1954) (opinion of Mr. Justice Jackson). See also, *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967).

This confusion visits incalculable harm upon both law enforcement and the citizenry. The dilemma it poses for police officers was stated in *Chapman* v. *U.S.*, *supra*, 365 U.S. at 622-23 (dissenting opinion of Mr. Justice Clark):

> "Every moment of every day, somewhere in the United States, a law enforcement officer is faced with the problem of search and seizure. He is anxious to obey the rules that circumscribe his conduct in this field. It is the duty of this Court to lay down those rules with such clarity and understanding that he may be able to follow them . . . It is disastrous to law enforcement to leave at large the inconsistent rules laid down in these cases."

Nor do the problems of law enforcement end with the police officer's decision. If he decides to search without a warrant, the burden then falls upon the prosecutor and the

trial judge to determine whether the articles seized should be proffered and admitted. "Since searches and seizures play such a frequent role in federal criminal trials, it is most important that the law on searches and seizures by which prosecutors and trial judges are to be guided should be as clear and unconfusing as the nature of the subject matter permits." *Chapman* v. *U.S., supra,* 365 U.S. at 618 (concurring opinion of Mr. Justice Frankfurter.).

The principal victim of the confusion, however, is the private citizen whom the Fourth Amendment is intended to protect. So long as the police officer is in doubt, he may err in favor of a warrantless search. When he does, the innocent citizen suffers an injury which cannot be repaired.

> "We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit. We must remember too, that freedom from unreasonable search differs from some of the other rights of the Constitution in that there is no way in which the innocent citizen can invoke any advance protection . . .
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> ". . . [A]n illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely beyond the court's supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search. There is no opportunity for injunction or appeal to disinterested intervention. The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence." *Brinegar* v. *United States,* 338 U.S. 160, 181, 182 (1949) (dissenting opinion of Mr. Justice Jackson).

Clearly these considerations dictate the adoption of a viable rule of general application, so that police officers

will know the limits of their authority, and citizens will not be subjected to searches ultimately found unlawful but undertaken by police officers who in good faith thought they were permitted.

As we will show herein, the *McDonald* rule—prohibiting warrantless searches except where "the exigencies of the situation" preclude the delay necessary to obtain a warrant, *McDonald* v. *U.S.*, 335 U.S. 451, 455 (1948)—is both an historically accurate embodiment of the central purpose of the Fourth Amendment and a viable rule of general application which would end the existing turmoil. Before proposing solutions, however, we first describe the two sources of the current turmoil.

2. *The Causes of the Present Turmoil*

There are two causes of the confusion which now dominates this area of the law. The first is that, throughout the past two decades, there has been a never-ending clash between two competing conceptions of the Fourth Amendment: what we shall call the *McDonald* view and the *Rabinowitz* view. The second is that, to the extent the *Rabinowitz* view has been followed, it has proven unmanageable in practice. We discuss each of these causes herein.

a. *Two Competing Conceptions of the Fourth Amendment.*

This Court has been rent asunder by a debate over the fundamental question of when a warrantless search is "reasonable". One school of thought—which we have captioned the *McDonald* view—holds that a search without warrant is "reasonable" only if "the exigencies of the situation" preclude delay. This view, which commanded a majority of the Court in *McDonald, supra; Carroll* v. *U.S.*,

276 U.S. 132 (1925);[1] *Taylor* v. *U.S.*, 286 U.S. 1 (1932);[2] *Trupiano* v. *U.S.*, 334 U.S. 699 (1948);[3] *U. S.* v. *Jeffers*, 342 U.S. 48 (1951);[4] and *Chapman* v. *U.S.*, 365 U.S. 610 (1961),[5] see also *Go-Bart Importing Co.*, 282 U.S. 344, 358 (1931); *Johnson* v. *U.S.* 333 U.S. 10 (1948); *Warden* v. *Hayden*, 387 U.S. 294, 298 (1967); *Camara* v. *Municipal Court*, 387 U.S. 523, 533 (1967), received its fullest exposition in Mr. Justice Frankfurter's dissenting opinion in *U.S.* v. *Rabinowitz*, 339 U.S. 56, 70 (1950):

> "One cannot wrench 'unreasonable searches' from the context and historical content of the Fourth Amendment. It was the answer of the Revolutionary statesmen to the evils of searches without warrants, and searches with warrants unrestricted in scope. Both were deemed "unreasonable.' Words must be read with the gloss of experience of those who framed them. Because the experience of the framers of the Bill of Rights was so vivid, they assumed that it

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[1] "In cases where the securing of a warrant is reasonably practicable, it must be used . . ." 267 U.S. at 156.

[2] "[T]he agents had made no effort to obtain a warrant for making a search. They had ample opportunity to do so and to proceed in an orderly way." 286 U.S. at 6.

[3] "It is a cardinal rule that, in seizing goods and articles, agents must secure and use search warrants wherever reasonably practicable. To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial process wherever possible." 334 U.S. at 705.

[4] "Over and over again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes . . . Only where incident to a valid arrest . . . or in 'exceptional circumstances' . . . may an exemption lie, *and then the burden is on those seeking the exemption to show the need for it.*" 342 U.S. at 48 (emphasis supplied).

[5] "No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons . . ." 365 U.S. at 615 (quoting and following *Johnson* v. *U.S.*, 333 U.S. 10, 15 (1948)).

would be carried down the stream of history and that their words would receive the significance of the experience to which they were addressed—a significance not to be found in the dictionary. When the Fourth Amendment outlawed 'unreasonable searches' and then went on to define the very restricted authority that even a search warrant by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity."

The contrary view—stated most strongly in the opinion of the Court in *Rabinowitz,* 339 U.S. 56, 65, 63—is that reasonableness for a warrantless search does not depend upon necessity; rather, the courts must determine what is reasonable in all the circumstances, on a case-by-case basis:

"A rule of thumb requiring that a search warrant always be procured wherever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystalized into a *sine qua non* to the reasonableness of a search.

* * *

"What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case . . . Reasonableness is in the first instance for the District Court to determine."

While *Rabinowitz* purported to overrule the "necessity" doctrine (339 U.S. at 66) it is fair to say that in the ensuing 17 years each of the doctrines has at times command-

ed a majority of the Court,[6] and in recent years the Court has shown a growing recognition that the comparative merits of the two theories must ultimately be reassessed.[7]

Rabinowitz left for subsequent case-by-case development the elucidation of what situations—other than those governed by necessity—would justify a warrantless search.

However, for the next 16 years, until *Cooper* v. *California*, 368 U.S. 58 (1967), the only situation in which *Rabinowitz* led to a different result than *McDonald* was with respect to the search "incident to an arrest".

Under the *McDonald* rule, a warrantless search incident to an arrest must be limited, geographically, to the person of the arrestee and the area which he can physically reach. Since the only "exigencies" precluding obtaining a warrant are that the arrested person might obtain a weapon or destroy evidence, the area which may be searched is the area he can reach:

> "Why is search of the arrested person permitted? For two reasons: first, in order to protect the arresting officer and to deprive the prisoner of potential means of escape . . . and, secondly, to avoid destruction of evidence by the arrested person . . . From this it follows that officers may search and seize not only the things physically on the person arrested, but those within his immediate control." *U.S.* v. *Rabinowitz*,

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[6] For example, in *Chapman* v. *U.S.*, 365 U.S. 610 (1961), the majority applied the "necessity" doctrine, and both the concurring and dissenting opinions viewed this as a repudiation of *Rabinowitz*, 365 U.S. at 618, 623. But in *Cooper* v. *California*, 386 U.S. 58 (1967), a 5-4 majority expressly followed *Rabinowitz*.

[7] See, e.g. *Abel* v. *U.S.*, 362 U.S. 217, 235, 249 (1960) (majority and dissenting opinions); *Stoner* v. *California*, 376 U.S. 483, 487 n. 5 (1964); *Wong Sun v. U.S.*, 371 U.S. 471, 480, n. 8, 497 (1963) (majority and concurring opinions). In recent cases, the Court has gone out of its way to emphasize that its decision in the particular case would be the same under either view, *Stoner, supra*; *Ker* v. *California*, 374 U.S. 23, 41 (1963); *Warden* v. *Hayden*, 387 U.S. 294, 298 (1967).

supra, 339 U.S. 56, 72 (dissenting opinion of Mr. Justice Frankfurter).

The *Rabinowitz* rule, however, recognized a third dimension which, albeit not "necessary", was regarded as "reasonable": the search might extend a certain distance beyond the reach of the arrested person—how far was to become a much-mooted question[8]—in order to uncover the fruits of the crime for which the person was arrested.

This latter factor has no place, of course, under the *McDonald* rule. Judge Learned Hand had so stated in his opinion below in *Rabinowitz:*

> "[If] the reasonableness of search is to depend upon the presence of the party in the premises searched at time of the arrest . . . that would make crucial a circumstance that has no rational relevance to the purposes of the privilege . . .
>
> It is true that when one has been arrested in his home or his office, his privacy has already been invaded; but that interest, though lost, is altogether separate from the interest in protecting his papers from indiscriminate rummage," *U.S.* v. *Rabinowitz,* 176 F.2d 732, 735 (2d Cir. 1949)

As Mr. Justice Frankfurter made clear, under the *McDonald* rule police officers might *seize* what was in open view in the room, for that involved no invasion of any remaining privacy (339 U.S. at 75), but they might not *search* for what was not visible.[9]

The consequences of the split between the *McDonald* and *Rabinowitz* doctrines escalated enormously in 1967, however, with the 5-4 decision in *Cooper* v. *California,* 386 U.S. 58 (1967). For the first time, an "unnecessary" war-

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[8] E.g., Cf. *Rabinowitz* and *Harris* v. *U.S.,* 331 U.S. 145 (1947) with *Kremen* v. *U.S.,* 353 U.S. 346 (1957).

[9] This distinction was emphasized in *Go-Bart, supra,* and *U.S.* v. *Lefkowitz,* 285 U.S. 452 (1932).

rantless search was allowed in a situation other than incident to an arrest, in this case of a car locked in a police garage. The search was considered "reasonable" because the car was "validly held by officers for use as evidence in a forfeiture proceeding". *Id.* at 62. As might be anticipated, law enforcement officers have already begun to develop additional theories to attract this Court's newly-kindled interest in expanding *Rabinowitz*. Thus, in *Harris* v. *United States,* October Term, 1967, No. 92, the Government argues that it is "reasonable" to search any car which it has lawfully seized.

b. *The Unmanageability of Rabinowitz.*

The second cause of the confusion which has marked this Court's efforts to define the validity of warrantless searches is that *Rabinowitz* has proved to be an unmanageable rule. In those cases in which the Court has sought to apply *Rabinowitz,* it has been called upon in the abstract to define when it is "reasonable" to forego a warrant—with no meaningful guide to govern that determination—and the result has been inevitable splits over what is "reasonable" and fluctuating decisions on similar facts. Cf., e.g., *Harris* v. *U.S.,* 331 U.S. 145 (1947) (validating a five-hour search of a three-room apartment) with *Kremen* v. *U.S.,* 353 U.S. 346 (1957) (invalidating a one-and-one-half hour search of a cabin) and *U.S.* v. *Rabinowitz,* 339 U.S. at 64 (validating the search, in part, because "the room was small" and "the search did not extend beyond the room used for unlawful purposes"). See also *Abel* v. *U.S.,* 362 U.S. 217 (1960) and *Cooper* v. *California,* 386 U.S. 58 (1967) in which the Court was divided over what was "reasonable".

3. *The Rabinowitz Rule Is Unworkable*

We submit that the *Rabinowitz* rule, as revitalized and extended in *Cooper,* unless checked will sap the Fourth Amendment of all meaning. For it has created a situation

in which it is inconceivable that police officers can determine the limits of their authority, and has cast this Court upon a sea of endless battles over what is "reasonable" in the abstract.

The inherent unworkability of *Rabinowitz* is implicit in the very recitation with which it was born. "What is a reasonable search is not to be determined by any fixed formula". 339 U.S. at 63. If there is no fixed formula, how are tens of thousands of police officers to know when they need a warrant? "[R]egrettably, . . . we have no ready litmus-paper test". *Ibid.* Nor do the police. "The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case." *Ibid.* How is a police officer to apply so elusive a test? "Reasonableness is in the first instance for the District Court to determine." *Ibid.* By then it is too late, for the police officer has already made the only meaningful determination; he has already searched, and the damage is done.

It may well be that the Court in *Rabinowitz* thought the standard of "reasonableness" would become clear in ensuing litigation. As we have already noted, the past 17 years have not borne out that expectation. In his dissent in *Rabinowitz,* Mr. Justice Frankfurter posed some questions about the scope of the "reasonablesness" test as applied to searches incident to arrest:

> "Is search to be restricted to the room in which the person is arrested but not to another open room into which it leads? Or, take a house or an apartment consisting largely of one big room serving as dining room, living room and bedroom. May search be made in a small room but not in such a large room? If you may search the bedroom part of a large room, why not a bedroom separated from the dining room by a partition?" (339 U.S. at 79).

These types of questions must be answered *in practice* by police officers every day. We respectfully submit, however, that 17 years after *Rabinowitz* no constitutional scholar could safely predict the answer to any of them.

In light of *Cooper,* similar questions will now abound with respect to the search of cars seized by the police. A unanimous state intermediate court, 234 Cal. App. 2d 587, 44 Cal. Rptr. 483, thought the search in *Cooper* was "unreasonable" in light of this Court's decision in *Preston,* 376 U.S. 364 (1964), only to learn that a majority of this Court believed otherwise. Can police officers be expected to do better? Can they be trusted to draw the line between *Preston* and *Cooper?* What other areas, as yet untapped, may join searches incident to arrest and forfeitable cars as appropriate occasions for warrantless searches? See, e.g., the Government's position in *Harris* v. *U.S.,* No. 92, this Term.

The practical consequences of confusion are today, of course, fifty times greater than when *Rabinowitz* was decided, for in the interim this Court has declared that the exclusionary rule is applicable to the states, *Mapp* v. *Ohio,* 367 U.S. 643 (1961), and that the same constitutional standards governing federal searches will be applied to state searches, *Ker* v. *California,* 374 U.S. 23 (1963). See also, *Id.* at 45 (concurring opinion of Mr. Justice Harlan).

4. *The McDonald Rule Is Workable*

The *McDonald* rule, unlike *Rabinowitz,* provides a standard which police officers can comprehend and apply. The question, in every case, is whether "the exigencies of the situation" preclude the delay required to obtain a warrant. The officer need consider only: "Do I have time to get a warrant?" While there will be occasional cases in which the particular facts make this debatable, in the vast majority of cases the answer will be clear. In *Carroll* v. *U.S.,* 267 U.S. 132 (1924), at a time when the *McDonald* rule was indisputably the law ("In cases where the securing of a warrant is reasonably practicable, it must be used . . ."

Id. at 156), the Court commended the rule as "a wise one, because it . . . is easily applied and understood, and is uniform." *Id.* at 159. And even *Rabinowitz*, while purporting to announce the rule's demise, acknowledged: "A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration." 339 U.S. at 65.

Nor would adoption of the *McDonald* rule entail any sacrifice in the effectiveness of law enforcement. By its very definition, the *McDonald* rule permits a warrantless search whenever the true demands of law enforcement require. To be sure, in other circumstances it may cause "inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate", but "These are never very convincing reasons" for foregoing a warrant. *Chapman* v. *U.S.*, 365 U.S. 610, 615 (1961).

5. *The McDonald Rule Is the Correct Interpretation of the Fourth Amendment*

Over and over again, this Court has recited that one of the "essential purposes" of the Fourth Amendment was to place the judiciary between the police officer and the citizen's privacy. *Jones* v. *U.S.*, 357 U.S. 493, 498 (1958):

> "The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy . . . That purpose is realized . . . by requiring that an impartial magistrate determine from an affidavit showing probable cause whether information possessed by law enforcement officers justifies the issuance of a search warrant".

See also, *McDonald, supra,* 335 U.S. at 455; *Warden* v. *Hayden,* 387 U.S. 294, 301 (1967); *See* v. *City of Seattle,* 387 U.S. 541, 546 (1967); *Berger* v. *New York,* 388 U.S. 41, 54 (1967).

In this way, it was assured that the decision to search would be made dispassionately, and not by the police officer whose interest in obtaining evidence might outweigh his respect for the constitutional right of privacy. *Johnson* v. *U.S.*, 333 U.S. 10, 13-14 (1948):

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime".

The framers of the Bill of Rights recognized, of course, that in some circumstances warrantless searches would be necessary, but it was only in such situations—where there is a *need* to bypass the judiciary—that the Fourth Amendment intended a warrantless search to be "reasonable". *U.S.* v. *Jeffers*, 342 U.S. 48, 51 (1951):

> "Over and over again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes . . . Only where incident to a valid arrest . . . or in 'exceptional circumstances' . . . may an exemption lie, *and then the burden is on those seeking the exemption to show the need for it.* [Citing *McDonald*]. In so doing the Amendment does not place an unduly oppressive weight on law enforcers but merely interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficent purposes intended . . . Officers instead of obeying this mandate have too often, as shown by the numerous cases in this Court, taken matters into their own hands . . ." (Emphasis supplied).

See also, *U.S.* v. *Rabinowitz*, 339 U.S. 56, 70 (1950) (dissenting opinion of Mr. Justice Frankfurter).

The *McDonald* rule—that warrantless searches are forbidden except where "the exigencies of the situation" preclude delay—fully comports with this constitutional purpose. It interposes an impartial magistrate in all cases but those where an overriding interest of law enforcement makes prompt search necessary.

The *Rabinowitz* rule, by contrast, is unfaithful to the constitutional purpose. It leaves room for police zeal, without judicial intervention, in cases where that sacrifice of protection is uncalled for and unnecessary. It "makes a mockery of the Fourth Amendment". *U.S.* v. *Rabinowitz*, 339 U.S. at 70 (dissenting opinion of Mr. Justice Frankfurter).

The *Rabinowitz* Court thought its conclusion required because broad searches incident to arrest had "always" been permitted. 339 U.S. at 60. As Mr. Justice Frankfurter showed extensively in dissent, however, *Id.* at 72-79, the Court's view of history was incorrect. We shall only briefly summarize his demonstration. Historically, the right to search incident to an arrest had been "strictly confined to the necessities of the situation, i.e. the search of the person and those immediate physical surroundings which may fairly be deemed to be an extension of his person". *Id.* at 72-73. "Of course in this field, as in others, opinions sometimes use language not with fastidious precision". *Id.* at 72. The *Rabinowitz* Court was mistakenly relying on such "loose language" in concluding that there were antecedent roots for its decision. (*Id.* at 75):

> "These decisions do not justify today's decision. They merely prove how a hint becomes a suggestion, is loosely turned into dictum, and finally elevated to a decision. This progressive distortion is due to an uncritical confusion of (1) the right to search the person arrested and articles in his immediate physical con-

trol and (2) the right to seize visible instruments or fruits of crime at the scene of the arrest with (3) an alleged right to search the place of arrest. It is necessary in this connection to distinguish clearly between prohibited searches and improper seizures. It is unconstitutional to make an improper search even for articles that are appropriately subject to seizure when found by legal means . . . .Thus the seizure of items properly subject to seizure because in open view at the time of arrest does not carry with it the right to search for such items".

Mr. Justice Frankfurter concluded, *Id.* at 79:

> "The short of it is that the right to search the place of arrest is an innovation based on confusion, without historic foundation, and made in the teeth of a historic protection against it."[10]

Thus, the result of *Rabinowitz*—which flies in the face of the purpose of the Fourth Amendment—cannot be justified as an historic exemption intended to be preserved by the framers of the Bill of Rights. With all respect, we suggest

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[10] Mr. Justice Frankfurter noted that in two prior cases the Court had slipped into the same error as in *Rabinowitz*. The first was *Marron* v. *U.S.*, 275 U.S. 192 (1927), but this error was quickly repaired in *Go-Bart Co.* v. *U.S.*, 282 U.S. 344 (1931) and *U.S.* v. *Lefkowitz*, 285 U.S. 452 (1932). The second was *Harris* v. *U.S.* 331 U.S. 145, 150 (1947), where the Court stated that "Search and seizure incident to lawful arrest is a practice of ancient origin". As Mr. Justice Frankfurter explained:

> "Literally, this is true: the right to search the person arrested and to seize visible instruments of crime has a good legal title. But judicial history cannot be avouched if this statement is meant to cover the right to search the place of arrest. Such a claim can only be made by sliding from a search for things in his 'possession' or 'in his immediate control', without regard to the treacherous ambiguity of these terms, and then using these phrases, taken out of their original context, so as to include the entire premises". (339 U.S. at 78-79).

that this is even more true of *Cooper* v. *California,* 386 U.S. 58 (1967), for there is not even historical *dictum* to justify approval of an unnecessary warrantless search simply because a car is "validly held by officers for use as evidence in a forfeiture proceeding". *Id.* at 62.

We have shown that *McDonald* is the historically correct interpretation of the Fourth Amendment. We submit, however, that even if this were not so—even if *Rabinowitz* correctly discerned a desire of the framers of the Bill of Rights to leave limited room for unnecessary warrantless searches—*McDonald* would today more closely effectuate the overall purpose of the Fourth Amendment. For 17 years of experience under *Rabinowitz* has shown that, in striving to define that limited area, the Court has left the entire law of search and seizure in confusion. By seeking precision in the grey area, *Rabinowitz* has converted the entire subject into a grey area. The consequence is that the essential purpose of the Fourth Amendment—protection of citizens against lawless searches—has been subjugated to the search for supposed limited exceptions. So long as the governing law remains cloudy, police officers will search under a colorable cloud of legitimacy. It is more important to remove the cloud than to demarcate an area for warrantless searches which are, by definition, unnecessary.

There is another side to the coin, too. The exclusionary rule is designed to deter police officers from engaging in unlawful searches. "[T]he purpose of the exclusionary rule is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it". *Mapp* v. *Ohio,* 367 U.S. 643, 656 (1961).

Rabinowitz, by clouding the field, virtually guarantees that that "deterrent" will be applied against police officers who thought they were obeying the rules. The consequence is that guilty men will go free where, under clearer direc-

tion from this Court, the police officers would have obtained a warrant and preserved the evidence for trial.

For all of the reasons set forth above, this Court should reiterate its declaration in *McDonald* that warrantless searches are prohibited except where the "exigencies of the situation" preclude delay. This announcement would, to be sure, overrule the holdings of three decisions of this Court.[11] But that is true of any clear rule which this Court might announce. Since its decisions "cannot be satisfactorily reconciled", *Abel* v. *U.S.*, 362 U.S. 217, 235 (1960), any ultimate resolution of the existing turmoil requires that some decisions be declared right and others wrong.

6. In the Instant Case, the "Exigencies of the Situation" Did Not Preclude Obtaining a Warrant

In the instant case, it is clear that the "exigencies of the situation" did not preclude obtaining a warrant. At the time the search was conducted, petitioners were inside the county jail, under arrest for reckless driving; the car was parked outside, having been towed there from the scene of the arrest; and petitioner McKinney, the owner of the car, had announced that he was going to leave it (J.A. 17). Accordingly, there was ample time for the police to go before a magistrate and, if able to make a sufficient showing of probable cause, to obtain a warrant for the search.

Accordingly, if *McDonald* states the governing principle for determining the reasonableness of warrantless searches, the search in this case contravened the Fourth and Fourteenth Amendments.

B. *Alternatively, the Search was "Unreasonable" in All the Facts and Circumstances of the Case*

In Part A, we showed that the Court should adopt a general standard for evaluating the validity of warrantless searches: whether the "exigencies of the situation" pre-

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[11] *Harris* v. *U.S.*, 331 U.S. 145 (1947); *U.S.* v. *Rabinowitz*, 339 U.S. 56 (1950); *Cooper* v. *California*, 386 U.S. 58 (1967).

cluded obtaining a warrant. We now show that even if the Court does not accept that position, and instead adheres to the *Rabinowitz* policy of determining "reasonableness" on the basis of the facts and circumstances of each case, it must conclude that the search here was unlawful.

The facts of this case are virtually indistinguishable from *Preston* v. *U.S.*, 376 U.S. 364 (1964), in which a warrantless search was held "unreasonable". In *Preston*, the defendants, while sitting in their parked automobile, were arrested by police officers for vagrancy. The defendants were taken to police headquarters, and their car was taken to the police garage. While defendants were under detention, the police conducted a search of the car without a warrant. This Court held the search to be unconstitutional:

> "The search of the car was not undertaken until petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime—assuming that there are articles which can be the 'fruits' or 'implements' of the crime of vagrancy. Cf. *United States* v. *Jeffers*, 342 U.S. 48, 51-52, 72 S.Ct. 93, 95, 96, 96 L.Ed. 59 (1951). Nor, since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction. See *Carroll* v. *United States*, *supra*, 267 U.S. at 153, 45 S.Ct. at 285, 69 L.Ed. 543. We think that the search was too remote in time or place to have been made as incidental to the arrest and conclude, therefore, that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as the result of the search inadmissible" (376 U.S. at 368).

Here, as in *Preston,* the search was "remote in time [and] place from the arrest". The arrest was made on an open highway; the search was conducted outside the county jail, substantially later. Nor was there "danger that the car would be moved out of the locality or jurisdiction" before a warrant could be obtained: petitioners were under detention, and presumably could have been held until the warrant was obtained; and in any event petitioner McKinney, the owner of the car, had announced that he was going to leave it.

Moreover, neither of the reasons assigned by the Court below could justify the search. There was no need to search "for weapons which might be utilized for resistance or escape" (J.A. 45), for the petitioners were already under detention in the county jail and did not have access to the automobile. Likewise the search could not be justified as "for evidence of the crime for which [defendants were] arrested" (J.A. 45), for they were arrested for reckless driving and there are no articles "which could be the 'fruits' or 'implements' of the crime" of reckless driving. Cf. *Preston* v. *U.S., supra,* 376 U.S. at 368.

Nor does it matter that here, as in *Preston,* a search of the car might arguably have been justified at the time it was initially stopped. *Preston, supra,* 376 U.S. at 367-68:

> "Here, we may assume, as the Government urges, that, either because the arrests were valid or because the police had probable cause to think the car stolen, the police had the right to search the car when they first came on the scene. *But this does not decide the question of the reasonableness of a search at a later time and at another place.* See *Stoner* v. *California,* post, p. 483" (Emphasis supplied).

In summary, this case is in all material respects indistinguishable from *Preston,* and the holding that the search there was unreasonable dictates the same result here.

The subsequent decision in *Cooper* v. *California,* 386 U.S. 58 (1967), does not shed doubt on this conclusion.[12] In *Cooper,* this Court upheld the search of a car "validly held by officers for use as evidence in a forfeiture proceeding." *Id.* at 62. In so holding, the Court relied upon special factors present neither in *Preston* nor here:

> "This case is neither *Preston* nor controlled by it. Here the officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car—whether the state had 'legal title' to it or not—was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained". (*Id.* at 61).

These considerations are totally inapplicable here. The police were not required by state law to seize the car; it was not seized in connection with the crime for which petitioners were arrested; it was not impounded, and it was not subject to forfeiture; the search was not closely related to the reason petitioners were arrested, i.e., reckless driving.

The distinguishing features of *Preston,* as described by the Court in *Cooper,* are equally present here:

> "Preston was arrested for vagrancy. An arresting officer took his car to the station rather than just leaving it on the street. It was not suggested that this was done other than for Preston's convenience or that the police had any right to impound the car and keep it from Preston or whomever he might send for it. The

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[12] In Part A, *supra,* we have urged that *Cooper* be overruled. We assume, in Part B, that *Cooper* is to remain the law.

fact that the police had custody of Preston's car was totally unrelated to the vagrancy charge for which they arrested him. So was their subsequent search of the car". (*Id.* at 61).

So, here, petitioners were arrested for reckless driving. The police took the car to the station, but it is not suggested that they had any right to impound it, or to keep it from petitioner McKinney—its owner—or whomever he might send for it. The fact of police custody of the car was totally unrelated to the reckless driving charge for which petitioners were arrested. So was the subsequent search.

C. *The Exclusionary Rule Applies to Criminal Contempt Proceedings*

We have shown that, for one reason or another, the search and seizure in this case must be found to have contravened the Fourth and Fourteenth Amendment. We now deal with the reason given by the Chancellor for admitting the evidence: that the exclusionary rule of *Mapp* is not applicable to a criminal contempt proceeding. As he put it, "You may be in good shape in a Criminal Court, but this is not Criminal Court". (J.A. 30).

This rationale was not relied upon by the Tennessee Supreme Court. And it seems clear that the exclusionary rule must apply to criminal contempt proceedings.

In *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965), this Court applied the exclusionary rule to a state court proceeding for forfeiture of a car. This Court characterized the forfeiture as "quasi-criminal in character. Its object, like a criminal proceeding, is to penalize the commission of an offense against the law". 380 U.S. at 700. "It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the for-

feiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible". *Id.* at 701. See also *Boyd* v. *U.S.*, 116 U.S. 616, 633-34 (1886).

These considerations apply with even greater force to criminal contempt proceedings. They, too, are at least "quasi-criminal" in character (see, e.g. J.A. 36), and this Court has held that many of the constitutional safeguards of criminal trials are applicable to them (see the discussion *infra,* Part II). The end-result of a criminal contempt trial may, as here, be a jail sentence, and it is inconceivable that the exclusionary rule would protect against the forfeiture of one's car but not the forfeiture of one's liberty. Finally, it is particularly true here (as shown in Part II) that to find contempt the Chancellor had to find that petitioners had engaged in a felony under the state criminal law. For all these reasons, the holding in *Plymouth Sedan* dictates that the exclusionary rule is applicable to criminal contempt proceedings.

It follows that the introduction of the gun and bullets at petitioners' trial contravened the Fourth and Fourteenth Amendments. Since without that evidence there was virtually nothing linking petitioners to the shooting, it is apparent that the error was not harmless (nor did the Tennessee Supreme Court even suggest that it was harmless, cf. *Chapman* v. *California,* 386 U.S. 18 (1967)). Accordingly, the conviction must be reversed.

II.

PETITIONERS WERE ENTITLED TO A JURY TRIAL

The basic question here presented is whether petitioners, who are alleged to have acted in contempt of a court decree by engaging in an act constituting a felony under state criminal law—firing a gun into an occupied house—have

a constitutional right to a jury trial in the criminal contempt proceeding. We show first that the Sixth Amendment creates such a right for federal contempt proceedings. We then show that the Fourteenth Amendment incorporates that right into state contempt proceedings.

A. *The Sixth Amendment Creates A Right to Jury Trial in Criminal Contempt Proceedings Involving Conduct Which Is a Felony Under State Law*

Even the most cursory look at the recent decisions of this Court reflects the wide divergence of views within the Court concerning the constitutionality of summary punishment for criminal contempt. See, for example, *Cheff* v. *Schnackenberg,* 384 U.S. 373 (1966); *United States* v. *Barnett,* 376 U.S. 681 (1964); *Green* v. *United States,* 356 U.S. 165 (1958). This much seems clear, however: on the one hand, a majority of the members of the Court continue to reject in conclusionary terms the broad proposition that *all* criminal contempt proceedings are criminal actions within the meaning of Article III [13] and the Sixth Amendment of the Constitution.[14] On the other hand, the Court has been most reluctant to declare that a contemnor would under no circumstances be entitled to a jury trial, and that a Judge could, in his own discretion, impose any jail sentence he desired for contumacious conduct.

Thus, in *Barnett,* the Court, after citing numerous cases that support summary disposition of criminal contempts, stated by way of *dictum:* "some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for

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[13] The relevant portion of Article III, Section 2, provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ."

[14] The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

petty offenses". (376 U.S. 681, 695 at n. 12). These same words were repeated, once again, in *Cheff*, 384 U.S. at 378-379, thus suggesting that the Court might be prepared to find that the Constitution safeguarded the right to trial by jury in at least certain federal criminal contempt proceedings.

The situation is further complicated, however, because the Court in *Cheff* ultimately chose to forego any further examination of the constitutional question and instead relied on its "supervisory power" over the federal courts in concluding that jail sentences exceeding six months for criminal contempt may not be imposed by federal courts unless a jury trial has been received or waived (*id.* at 380).[15] In other words, the Court decided *Cheff* without placing express reliance on any constitutional interpretation.

But the Court has now granted certiorari in *Bloom* v. *People of the State of Illinois* (Oct. Term 1967, No. 52, cert. granted April 17, 1967) and the instant case, both involving the right to jury trial in state court criminal contempt proceedings. Quite obviously, this Court's supervisory power over the federal judiciary is of no relevance to these proceedings, and consequently the Court must decide here whether there is a constitutional right to jury trial in criminal contempt proceedings in the unique circumstances where the contumacious conduct itself constitutes a felony under State law and/or the penalty imposed is a substantial period of imprisonment.[16]

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[15] See also *Ford* v. *Boeger*, 362 F.2d 999, 1007 (8th Cir., 1966).

[16] In *Bloom* the questions presented, *inter alia* are: (1) is a defendant in a State Court Trial for criminal contempt entitled under the Fourteenth Amendment to the Constitution of the United States to a trial by jury, particularly where the conduct alleged as contempt is not petty nor trivial, but is a felony under the law of the State?; and, (2) do not *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966) and the Fourteenth Amendment to the Constitution of the United States require jury trials in State Court criminal contempt proceedings where the sentence imposed amounts to two years?

We are not writing on a clean slate; much has already been said concerning the general problem posed by summary criminal contempt proceedings. This has been the subject of extensive analysis by the judiciary, the Congress,[17] and numerous scholarly works by historians and law review commentators.[18] However, even at this late date, fundamental and deep-seated differences of opinion still prevail on many basic questions.

Thus, for example, in *Ex Parte Quirin,* 317 U.S. 1 (1942), the Court stated (*id.* at 40) "Trial by jury of criminal contempts may constitutionally be dispensed with in the federal courts in those cases in which they could be tried without a jury at common-law". But the dispute rages on as to whether the cases decided under the English common-law, and during the early Colonial period, establish sufficient precedent for the principle of summary disposition of criminal contempts so as to support the inference that the founding fathers, in drafting the Constitution, intended to exempt all criminal contempt proceedings from the general requirement of jury trials for criminal prosecutions.[19] And this, in turn, is closely interrelated with the vexing question whether criminal contempt should be

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[17] See discussion infra.

[18] See, for example, Frankfurter & Landis, "The Power to Regulate Contempts", 37 Harv. L. Rev. 1010 (1923); Beale, "Contempt of Court, Criminal and Civil", 21 Harv. L. Rev. 161 (1909); Fox, "The King of Almon", 24 Law Q. Rev. 184 (1880); Fox, "The Summary Process to Punish Contempt", 25 Law Q. Rev. 238, 254 (1909); Fox, "Eccentricities of the Law of Contempt of Court", 36 Law Q. Rev. 394 (1920); Fox, "The Practice in Contempt of Court Cases", 38 Law Q. Rev. 184 (1922); Goldfarb "The Contempt Power" (Columbia University Press, 1963); and 4 Blackstone's *Commentaries.*

[19] Compare, *Cheff* v. *Schnackenberg, supra,* 384 U.S. at 380; *Ex Parte Grossman,* 267 U.S. 87; *Gompers* v. *United States,* 233 U.S. 604, 610-611; and *Green* v. *United States,* 356 U.S. 165, 201 (Black, J. dissenting).

viewed as a criminal prosecution, or rather, as a "sui generis" procedure.[20]

While there is a general tendency to describe criminal contempt as a "sui generis" procedure, this can be misleading. For this Court has long held that many of the protections available to a defendant in a criminal trial are equally applicable to a summary contempt proceeding. See,

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[20] In *Green* v. *United States*, Mr. Justice Black, dissenting, stated as follows (356 U.S. at 202-203) ". . . it seems clear that until at least the late Seventeenth or early Eighteenth Century, the English courts, with the sole exception of the extraordinary and ill-famed Court of Star Chamber, whose arbitrary procedures and gross excesses brought forth many of the safeguards included in our Constitution, neither had nor claimed power to punish contempts committed out of Court by summary process. Fox, 'The History of the Contempt of Court', and Frankfurter and Landis, 'Power to Regulate Contempts', 37 Harv. L. Rev. 1010, 1042-1052; Beale, 'Contempt of Court, Criminal and Civil', 21 Harv. L. Rev. 161. Prior to this period such contempts were tried in the normal and regular course of the criminal law, including trial by jury".

Thereafter, (*id.* 205-206) Mr. Justice Black quotes from the mentioned article by Frankfurter and Landis thusly. ". . . the Clayton Act [providing for jury trial of certain charges of criminal contempt] does nothing new. It is as old as the best traditions of the common law . . .

"Down to the early part of the Eighteenth Century cases of contempt even in and about the common-law courts when not committed by persons officially connected with the court were dealt with by the ordinary course of law, i.e., tried by jury, except when the offender confessed or when the offense was committed 'in the actual view of the court' ,...

"[U]ntil 1720 there is no instance in the common-law precedents of punishment otherwise than after trial in the ordinary course and not by summary process".

Compare, however, the statement contained in the majority opinion of Mr. Justice Harlan in *Green* (*id.* at 185)—". . . it at least seems clear that English practice by the early Eighteenth Century comprehended the use of summary powers of conviction by courts to punish for a variety of contempts committed within and outside the Court".

These seemingly irreconcilable interpretations of the history of contempt power under the common-law are scattered throughout the *Green* and *Barnett* opinions.

for example, *Gompers* v. *Bucks Stove & Range Company*, 221 U.S. 418, 444 (1911) (proof of guilt beyond a reasonable doubt and freedom from compulsion to testify); *Cooke* v. *United States*, 267 U.S. 517, 537 (1925) (compulsory process and right to assistance of legal counsel). So too, the Court has held that a contemnor in a criminal contempt proceeding is entitled to the benefit of the statute of limitations generally governing crimes (*Gompers* v. *United States*, 233 U.S. 604, 611-612) (1914) and has the right to be considered for a pardon. *Ex Parte Grossman*, 267 U.S. 87, 115, 118 (1925). Thus, while the Court continues to espouse the "sui generis" nature of the criminal contempt procedure, it has nonetheless required that such proceedings be accompanied by many of the fundamental safeguards associated with criminal prosecutions generally.

Suffice it to say, however, at this point in history, a majority of the Court has endorsed the principle that there is no constitutional right to a trial by jury where the criminal contempt consists of either misbehavior in Court[21] or general disobedience of a court decree[22] and the penalty imposed is comparable to that customarily meted out for a petty offense.

The Court need not reexamine this broad proposition to dispose of the instant case.[23] For we believe that the ap-

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[21] Historically, courts have been deemed to have the inherent power to punish for contempts committed in their presence on the theory that such disrespectful acts tend to obstruct or degrade the administration of justice. See, for example: *Ex Parte Terry*, 128 U. S. 289, 302-304 (1888) (misconduct in court room); *Savin, Petitioner*, 131 U. S. 267, 277 (1889) (attempt to bribe witnesses); *Blackmer* v. *United States*, 284 U.S. 421, 440 (1932) (failure to respond to subpoena).

[22] See, for example, *Gompers* v. *Bucks Stove & Range Company*, 221 U.S. 419; *In Re Debs*, 158 U.S. 564 (1895).

[23] It may be argued persuasively that the opposite conclusion is warranted and that the right to trial by jury attaches to all criminal contempts. See dissenting opinion of Mr. Justice Black, with whom Chief Justice Warren and Mr. Justice Douglas concurred in *Green* v.

propriate point of departure for the correct resolution of this case is the Court's opinion in *Cheff*. There, four members of the Court — Chief Justice Warren and Justices Clark, Brennan and Fortas—rested their constitutional ruling that the right to a jury trial does not attach to *all* criminal contempt proceedings on the fact that Cheff's contempt proceeding—alleging the failure to comply with a federal court cease and desist order relating to deceptive trade practices—was equivalent to a procedure to prosecute a petty offense. Since the latter has historically been viewed as a narrow and unique class of cases not constituting "Criminal prosecutions" as defined in the Sixth Amendment,[23a] so too was the criminal contempt proceeding initiated against *Cheff*.

We believe the converse of this reasoning dictates the disposition of this case. Where, as here, the criminal contempt proceeding is not the equivalent of a procedure to prosecute a petty offense, but rather carries with it the indicia of a criminal prosecution, then the constitutional right to a jury trial should be vouchsafed. We explain below why this is so.

The act of misconduct, upon which the State Court based its contempt order, was itself a felony—shooting bullets into the house of a person calculated to produce death or bodily harm. Not only was such conduct a statutory felony under Tennessee law,[24] but it was an indictable offense at common law as well. Under any standard of reasonableness, then, a proceeding designed to punish individuals for engaging in felonious conduct of a serious anti-social nature

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U.S., supra; see also, the dissent of Mr. Justice Black in *Barnett;* and the dissent of Mr. Justice Douglas in *Cheff*.

[23a] See, for example, *Callan* v. *Wilson,* 127 U.S. 540, 557 (1888); *Natal* v. *Louisiana,* 139 U.S. 621 (1891); *Lawton* v. *Steele,* 152 U.S. 133 (1894); *Schick* v. *U.S.,* 195 U.S. 54, 68-72 (1904); *District of Columbia* v. *Colts,* 282 U.S. 63, 72-73 (1930).

[24] Title 39, Tennessee Code Annotated, Sections 601, 603, 613.

cannot be deemed to be the equivalent of a prosecution for a petty offense.

It may be appropriate to view the more traditional contempt proceedings—for misbehavior in court and general disobedience of a court decree—as "sui generis" rather than criminal prosecutions under the Sixth Amendment. But this is plainly not so where, as here, the alleged act of contempt is itself a felony. At least in these circumstances, the words of Mr. Justice Holmes (*Gompers* v. *U.S.*, 233 U.S. 604, 610-611) ring true: "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, 3 Transactions of the Royal Historical Society, N.S. p. 147 (1885), and that, at least in England, it seems that they still may be and preferably are tried in that way . . ." Accord: *Michaelson* v. *United States*, 266 U.S. 42, 66 (1924); *U.S.* v. *Barnett*, *supra*, 376 U.S. at 755 (Goldberg, J., dissenting): *Green* v. *United States*, *supra*, 356 U.S. at 201 (Black, J. dissenting).

To conclude that petitioners were not involved in a "criminal" prosecution would be totally unwarranted here. The decision to hold the petitioners in criminal contempt only came after the Court had heard testimony presented both in support and opposition to the charge that certain individuals had fired bullets from a rifle into the home of a non-striker. The Court, thus, for all intents and purposes performed the exact function which a jury normally performs in a major criminal case—to wit, passing on the question whether the defendants were guilty or innocent of a felony. Indeed, the Court's own evaluation of its function is revealing. Judge Woodlee stated (R. 166): ". . . . [O]f course, the Court is the jury in this case, but to my mind—I am naturally, I would be more disturbed about the con-

sequences of a criminal trial in Monroe County than in this Court because of the comparative difference in penalties in the event of guilt." From the foregoing it would seem to follow, virtually by definition, that this proceeding was not the equivalent of a prosecution for a petty offense.

The precise distinction discussed above—i.e., between traditional contempts and those which themselves constitute independent, serious felonious acts—has been drawn by the Congress, both in the general contempt statutes and in one law relating specifically to contempts arising out of labor disputes.

Thus, 18 U.S.C. Sec. 3691 provides, in relevant part:

> "Whenever a contempt charge shall consist of willful disobedience of any lawful writ, process, order, rule, decree, or command of any District Court of the United States . . . *and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress or under the laws of any State* in which it was done or omitted, *the accused, upon demand therefor, shall be entitled to trial by jury,* which shall conform as near as may be to the practice in other criminal cases.
>
> "This section shall not apply to contempts committed in the presence of the Court or so near thereto as to obstruct the administration of justice . . ." (Emphasis added.)

See also 18 U.S.C. Sec. 402, 62 Stat. 701 (1949); and Rule 42(b) of the Federal Rules of Criminal Procedure.[25]

So too, the Norris-LaGuardia Act, 18 U.S.C. Sec. 3692, provides, in relevant part, as follows:

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[25] Further provisions for trial by jury in specific criminal contempt proceedings are contained in the Civil Rights Act of 1957 (42 U.S.C. Sec. 1995, 71 Stat. 638), and the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. Sec. 528, 73 Stat. 541).

> "In all cases of contempt arising under the Laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the contempt shall have been committed. This Section shall not apply to contempts committed in the presence of the Court or so near thereto as to interfere directly with the administration of justice, nor to the misbehaviour, misconduct, or disobedience of any officer of the Court in respect to the writs, orders or process of the Court."

To be sure, under Tennessee Law a ten-day imprisonment is the maximum sentence which a Court can impose for criminal contempt.[26] This thus presents the incongruous picture of a Court punishing a serious felonious act in the name of "contempt" by imposing a relatively minor jail sentence.[27] Obviously, the position we assert would be even less assailable if *both* the nature of the offense and the punishment which could be imposed reflected the gravity of the

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[26] See, Title 23, Tennessee Code Annotated, Sec. 903.

[27] Cf., Justice Goldberg's dissent in *United States* v. *Barnett, supra,* 376 U.S. at 728, which focused on the close correlation between the petty nature of criminal contempts at the time the Constitution was written and the trivial penalties generally imposed for such contempts. Directing his attention to those instances, Justice Goldberg concluded (*id.* at 759) "that contempts which are punishable as crimes must be tried by a jury". We do not construe this to mean, however, that the only test for determining whether a contempt proceeding is equivalent to a criminal prosecution for purposes of the Sixth Amendment is to ask: how is the contempt punishable? Where, as here, the alleged act of contempt itself constitutes a serious felony under state law, then we do not read the *Barnett* dissent to deny the right to trial by jury, even if the maximum punishment which could be imposed is relatively minor.

contempt charge.[28] But, we submit the nature of the offense should suffice to mark the procedure "criminal", for jury trial purposes, regardless of the amount of punishment authorized or imposed.

Our inquiry here is essentially similar to that of determining "whether a given offense is to be classified as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury." *District of Columbia* v. *Colts, supra,* 282 U.S. at 73.

In *Colts,* as here, the offense charged (reckless driving) was not merely *malum prohibitum,* but in its very nature *malum in se*—an indictable offense at common-law. Because of this fact the Supreme Court held that the defendant had a constitutional right to a jury trial, even though the maximum punishment he faced was 30 days' imprisonment.

The primary reliance which the Court has placed on the nature of the offense rather than merely the possible penalty which could be imposed upon the defendant is forcefully illustrated in the comparison between *Callan* v. *Wilson* (127 U.S. 540) and *District of Columbia* v. *Clawans* (300 U.S. 617) (1937). In *Callan,* the Court held that the right to trial by jury attaches to a defendant charged with a crime of conspiracy because that was considered to be a grave offense, even though only punishable by a maximum of 30 days' imprisonment; in *Clawans,* by contrast, the Court denied the right to a jury trial because the offense of

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[28] In *Bloom* v. *People of Illinois,* an alternative argument is presented that jury trial is required in those instances where even if the contempt is in most respects petty and trivial and not a crime at common-law, the severity of the penalty imposed renders the proceeding comparable to a prosecution of a common-law crime. Cf. *Cheff* v. *U.S.; U.S.* v. *Barnett, supra,* 376 U.S. at 695, n. 12; *District of Columbia* v. *Clawans, supra,* 300 U.S. at 627. In view of the penalty imposed in this case, this alternative issue is not squarely presented here, and we have therefore refrained from discussing it at length.

selling second-hand goods without a license was deemed not sufficient to give it the character of a serious crime, even though the maximum punishment there was 90 days' imprisonment.

This same analytical approach is equally valid here. Stated otherwise, just as the question whether a defendant accused of crime is entitled to a jury trial depends primarily upon the nature of the offense where the potential sentence is small (*ibid*), so too, this same test should apply to criminal contempt proceedings. The logic of focusing attention on the offense charged, and not merely the potential punishment, seems irrefutable. Suppose, for example, a law was passed limiting to six months the maximum imprisonment if proven guilty of premeditated murder; in that circumstance, we are confident that any such accused person would not be held to have lost the cherished right to trial by jury merely because of the ceiling placed on potential imprisonment.

For those who would limit the focus of their inquiry to the relatively small number of days for which an individual is subject to imprisonment, we would urge that there are numerous other equally significant ramifications which flow from and reflect the serious societal consequences of being found guilty of criminal contempt. Thus, for example, a conviction for criminal contempt has been deemed to be tantamount to a conviction for a "crime" within the meaning of a government regulation barring certain military veterans from burial in Arlington National Cemetery. Significantly, in the course of this advisory ruling, the Attorney General stated: "Criminal contempt is regarded as a crime for most purposes . . ." *Cheff* v. *Schnackenberg, supra,* 384 U.S. at 385-386 (dissenting opinion). The Government has thus placed the contemnor in the totally untenable position of being treated as having committed a "crime" once *convicted* of criminal contempt *but* as not being tried for a crime—or entitled to a jury trial—in the contempt proceed-

ing itself! Practical realities of this kind buttress petitioners' contention that the fundamental right of trial by jury is and should have been a condition precedent to the instant jail sentence.[29]

This Court has recently reaffirmed its longstanding concern over the "possible abuse of the contempt power." *Harris* v. *United States*, 382 U.S. 162, 164 (1965). The need for a jury trial is especially compelling in contempts, as here, arising out of labor disputes; such disputes often become a *cause celebre* in the particular community involved. Emotion and passion may then supplant reason. And there can be little question but that certain judges could unwittingly succumb to the temptation of permitting a strongly anti-labor orientation of a given community to color their judgment in the contempt proceeding. For "[j]udges are not emotionally different from other government officials. Fortunately they remain human even after assuming their judicial duties. Like all the rest of mankind they may be affected from time to time by pride and passion, by pettiness and bruised feelings, by improper understanding or by excessive zeal." (Black, J. dissenting in *Green* v. *U.S., supra*, 356 U.S. at 198).

Further, the anomalous consequences of reaching any other conclusion here should not pass unnoted. The State Court, in the guise of exercising its contempt power, has, in effect, found the petitioners guilty of committing the serious felony of shooting into the home of a fellow human being with the intent to kill or inflict bodily harm. The State could have instituted a criminal procedure by indictment against petitioners under the Criminal Code of Tennessee. But it chose not to do so. If it had done so, the petitioners clearly would have been entitled to a jury trial. Indeed,

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[29] Note also in this connection the fact that the Seventh Amendment guarantees the right to trial by jury in civil actions where the value in controversy exceeds $20.00. See also *District of Columbia* v. *Clawans*, 300 U.S. 617, 633-634 (dissenting opinion).

under the Tennessee Constitution, this right attaches with respect to all criminal cases—misdemeanors and felonies alike—in which imprisonment, no matter how short, is an authorized sentence. *Willard* v. *State,* 174 Tenn. 645, 130 S.W. 2d 99 (1939). This further highlights the incongruity of the petitioners' situation—they are in effect being tried for a felony without the safeguard of a jury verdict, whereas even those persons charged with a misdemeanor in Tennessee have the right to demand a jury trial. So too, if this very same criminal contempt procedure had arisen in federal, rather than state court, petitioners would have been entitled to a jury trial. See 18 U.S.C. Secs. 369 and 402.

In sum, it is petitioners' claim that the accused in a criminal contempt proceeding is entitled to the benefit of a trial by jury as prescribed by the Constitution where, as here, without regard to the sentence which could be imposed, the contempt proceeding cannot be deemed the equivalent of the prosecution of a petty offense, because the nature of the offense alleged as contempt constitutes a serious felony under state or federal law. Cf. *Callan* v. *Wilson,* 127 U.S. 540 (1888), *District of Columbia* v. *Colts* 282 U.S. 63 (1930).

B. ***The Sixth Amendment's Jury Trial Guarantee Is Applicable to State Court Proceedings By Virtue of the Fourteenth Amendment.***

We have shown above that the instant contempt proceeding was the equivalent of a criminal prosecution. Trial by jury in criminal prosecutions is one of the fundamental rights guaranteed by the Sixth Amendment to the Constitution. Because the right to trial by jury is a basic safeguard of liberty, immune from federal abridgment, we show below that it is equally protected from state invasion by the due process clause of the Fourteenth Amendment.

This Court has not yet decided whether the Sixth Amendment's guarantee of the right to jury trial is equally

applicable to state criminal proceedings.[36] In a series of recent decisions, however, the Court has held that every other guarantee contained in the Sixth Amendment is obligatory upon the states by virtue of the Fourteenth Amendment. Thus, in the landmark *Gideon* v. *Wainwright*, decision, 372 U.S. 335 (1963), the Court held that a defendant in a state criminal proceeding for a non-capital offense was entitled to a court appointed attorney, since the Sixth Amendment's guarantee of "assistance of counsel" in all criminal prosecutions is such a fundamental safeguard that it is applicable to the states. So too, in *Pointer* v. *Texas*, 380 U.S. 400 (1965), the Court held that the Sixth Amendment's right of an accused in a criminal proceeding to confront the witnesses against him is likewise a fundamental right made obligatory on the states by the Fourteenth Amendment (*id.* at 403). See also, *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967) (speedy trial); *Irwin* v. *Dowd*, 366 U.S. 717 (1961) (impartial jury); *Washington* v. *Texas*, 388 U.S. 14 (1967) (compulsory process).

These Sixth Amendment cases aptly reflect the overall trend of the Court's recent decisions holding that fundamental rights enumerated in other portions of the Bill of Rights are likewise immune from state invasion by the Fourteenth Amendment. See, for example, *Ker* v. *California*, 374 U.S. 23 (1963) (Fourth Amendment standard of legality for searches without a warrant); *Mapp* v. *Ohio*, 367 U.S. 643 (1961) (exclusion of illegally seized evidence); *Malloy* v. *Hogan*, 378 U.S. 1 (1964) (Fifth Amendment protection against self-incrimination); *Aguilar* v. *Texas*, 378 U.S. 108 (1964) (Fourth Amendment standard for the issuance of a search warrant); *Robinson v. California*, 370 U.S. 660 (1962) (Eighth Amendment protec-

[36] The Court granted certiorari in *Duncan* v. *Louisiana*, Case No. 410, October Term 1967, to consider this precise issue in a criminal case, along with *Bloom* and the instant case, which present the issue in a criminal contempt setting.

tion against cruel and unusual punishment).[31]

The breadth of the Court's language in *Pointer* is particularly significant. Directing its attention to the claim that the Sixth Amendment's right to confrontation does not apply to state courts because the Sixth Amendment as a whole is inapplicable, the Court stated (*id.* at 406): ". . . of course, since *Gideon* v. *Wainwright, supra,* it no longer can broadly be said that the Sixth Amendment does not apply to state courts . . . In the light of *Gideon, Malloy* and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the States by virtue of the Fourteenth Amendment, the statements made in *West* and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law."

This much, therefore, seems clear from the foregoing: at least with respect to those guarantees contained in the Bill of Rights which the Court considers "fundamental rights" the States will be bound by the provisions of the first eight amendments by virtue of the Fourteenth Amendment. Where such fundamental rights are concerned, this Court "has rejected the notion that the Fourteenth Amendment applies to the States only 'a watered-down, subjective version of the individual guarantees of the Bill of Rights'." (*Malloy v. Hogan,* 378 U.S. 1, 10-11).

There can be no dispute but that the right to trial by jury in "criminal" cases stands on equal footing with, and is just as fundamental as, the right to confront witnesses, the right to counsel, and the right to an impartial jury. Indeed, each of those mentioned rights constitute but integral parts of the overall right to a fair trial by jury—the precise right involved here. The importance which our founding fathers attached to this right is self-evident. For they

[31] See also the cases cited in *Gideon, supra,* 372 U.S. at 341, n. 4, holding that the First Amendment's freedoms of speech, press, religion, assembly, association and petition are fundamental guarantees immune from state invasion by the Fourteenth Amendment.

viewed "trial by jury of laymen and no less . . . as the birthright of free men" (Black, J., dissenting in *Green* v. *U.S.*, *supra*, 356 U.S. at 209). Accordingly, the right to trial by jury provided by the Sixth Amendment is applicable here.

Moreover, totally apart from any consideration whether the Sixth Amendment has been incorporated into the Fourteenth Amendment by the "process of absorption"[32] the right to a trial by jury in the instant circumstances is "implicit in the concept of ordered liberty" and thus protected by the due process provision of the Fourteenth Amendment. See, for example, Harlan, J., concurring in *Pointer* v. *Texas*, *supra*, 380 U.S. at 408-409.

[32] *Palko* v. *Connecticut*, 302 U.S. 319, 326 (1937).

CONCLUSION

For the foregoing reasons, petitioners submit that the decision of the Supreme Court of Tennessee should be reversed and the case should be remanded to State Court for a trial by jury in which its illegally seized evidence shall not be admissible.

Respectfully submitted,

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SUPREME COURT, U. S.

NO. 149

FILED

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

WAYNE DYKE, ED McKINNEY
and JOHN BLACKWELL,
Petitioners,

v.

TAYLOR IMPLEMENT MANUFACTURING
COMPANY, INC.,
Respondent.

On Writ of Certiorari to
The Supreme Court of Tennessee

BRIEF FOR RESPONDENT

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TAYLOR IMPLEMENT MANUFACTURING
COMPANY, INC.,
Respondent.

On Writ of Certiorari to
The Supreme Court of Tennessee

BRIEF FOR RESPONDENT

JURISDICTIONAL STATEMENT

The basis of this Court's jurisdiction, as asserted by petitioners, is 28 U.S.C. § 1257(3); however, for the reasons hereinafter set out respondent respectfully submits the Court improvidently granted the writ of certiorari as to Question Three presented in petitioners' brief and, therefore, lacks jurisdiction to consider said Question Three.

QUESTIONS PRESENTED

1. Was the search of the automobile in which petitioners were riding at the time of their arrest and the seizure of a rifle found therein reasonable in view of all the facts developed in the record?

2. Was the issue of whether the Fourteenth Amendment makes the Sixth Amendment's jury trial guarantee obligatory upon the states in criminal contempt cases properly raised in the Supreme Court of Tennessee or actually considered and determined by that court?

3. Does the Fourteenth Amendment make the Sixth Amendment's jury trial guarantee obligatory upon the states in criminal contempt cases?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

***The Constitution of the State of Tennessee*:**

Article 1, Section 6. "That the right of trial by jury shall remain inviolate. . . ."

***Rules of the Supreme Court of Tennessee*:**

Rule 15. *Brief in support of assignments of error.* —The assignments of error must be accompanied by a brief, which shall state concisely and specifically the propositions of law and fact, without argument or elaboration, relied upon by the appellant, or plaintiff in error, to sustain the several errors assigned for reversal of the trial court. There must follow each proposition of law a citation of the authorities relied upon to sustain it, and there shall follow each proposition of fact citations to the record which are relied upon to sustain the contention of the appellant, or plaintiff in error.

(1) *This brief must be filed in all cases.* —It may be combined with the assignments of error, or filed in a separate form. An argument will not supply the place of a brief.

(2) *Case affirmed when assignments of error not filed.* —When appellants, or plaintiffs in error, in civil cases, fail or refuse to file an assignment of errors and brief, as required by this rule, it will be taken as an abandonment of the appeal or writ of error, and the decree or judgment will be affirmed. Errors not assigned and supported by brief according to this rule, will be treated as waived, but the court, in its discretion, may notice an error overlooked by counsel.

Note: The above rule of the Supreme Court of Tennessee is officially noted in Volume 185, Tennessee Reports, page 870, and also in Volume 1, Tennessee Code Annotated, pages 824-825.

STATEMENT OF CASE

In addition to the petitioners' statement of the case, the following facts are pertinent. The sheriff of Monroe County received a call on the night petitioners were arrested concerning a shooting at the home of Lloyd Duckett involving an automobile which was described at the time. A description of the car was then broadcast by the sheriff's office. (J.A. 20). The description which was broadcast over the radio matched the car in which petitioners were later apprehended. (J.A. 22).

Deputy Sheriff Powers of McMinn County heard the alert at about 11:00 P.M. while patrolling and drove toward Englewood, Tennessee, a town in McMinn County but near the Monroe County line. As he approached Englewood he met a car which matched the description which he had

received, and he turned around and chased it at speeds of 70 to 80 miles per hour, but was not able to overtake it so he called the Athens city police who stopped the car in which petitioners were riding. Powers arrived before any of the occupants alighted from the automobile. While talking to the driver Powers observed a fresh bullet hole in the rear of the car in which petitioners had been riding. The driver said it had been there a long time. Before taking petitioners to jail, Powers called the Monroe County sheriff and advised him that he thought he had the right car. (J.A. 26-29). The McMinn County sheriff also observed the bullet hole in petitioners' car and testified that in his opinion it was made that very night. (J.A. 33).

Petitioners were taken to the McMinn County jail about 11:30 P.M. (J.A. 33) where the driver was placed under arrest for reckless driving and then Deputy Powers immediately went back outside the jail and searched petitioners' automobile and found a gun under the front seat. (J.A. 30).

ARGUMENT

I. THE SEARCH OF PETITIONERS' AUTOMOBILE WITHOUT A WARRANT WAS NOT UNCONSTITUTIONAL.

The petitioners contend that error was committed in allowing certain evidence to be introduced concerning a rifle found in the automobile in which petitioners were riding in contravention of their rights under the Fourth and Fourteenth Amendments of the Constitution of the United States.

The evidence which petitioners charge was illegally obtained relates solely to the rifle. As will be shown, the search which uncovered this weapon was reasonable and therefore not in violation of the constitutional guaranties against unreasonable searches and seizures. The validity of the search in this case may be sustained either upon the ground that the arresting officers had probable cause for believing that petitioners had committed a felony and the search was incident to the arrest or upon the ground that the automobile was validly held as evidence in the commission of a felony. Cf. *Cooper v. California*, 386 U.S. 58.

A. The Validity of a Search Without a Warrant Depends Upon all of the Facts and Circumstances of the Case and Not Solely Upon the Practicality of Obtaining a Warrant.

Considerable emphasis is placed by petitioners upon the contention that under a proper interpretation of the Fourth Amendment a search without a warrant is reasonable only if the exigencies of the situation make it impracticable to obtain a warrant. To be certain, the birth of this doctrine with respect to searches incident to a lawful arrest occurred in the 1948 case of *Trupiano v. U. S.*,

334 U.S. 699, and was affirmed later in the same year in *McDonald v. U. S.*, 335 U.S. 451. Petitioners rely heavily upon what they label the "*McDonald* rule" perhaps in an attempt to avoid the stigma of the discredited "*Trupiano* rule."

The principle enunciated in *Trupiano* was short-lived. *U. S. v. Rabinowitz*, 339 U.S. 56, specifically overruled *Trupiano* to the extent that it "requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest." 339 U.S. at 66. No subsequent opinion has suggested that *Rabinowitz* has been overruled. Indeed, the 1967 decision in *Cooper v. California*, 386 U.S. 58, cited *Rabinowitz* with approval in upholding a search of an automobile validly held as evidence in a forfeiture proceeding. The search in *Cooper* was not incident to an arrest, for it was made one week after the arrest and seizure of the automobile.

Petitioners in their brief argue that the so-called "*McDonald* rule" would work better than the rule in *Rabinowitz* which requires a review of all pertinent factors in determining whether or not a search is reasonable. To require a search warrant in all instances where there is time to obtain one, would, according to petitioners, be easy to administer and would result in less confusion on the part of law enforcement officials with the result that there would be fewer instances in which guilty men are freed because of an improper search.

Justice Minton in the *Rabinowitz* opinion admitted that "a rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search." 339 U.S. at 65.

Only unreasonable searches and seizures are condemned by the Fourth Amendment. Reasonable searches may be made without a warrant. The Constitution does not define the limits of reasonable warrantless searches, but rather, the framers of the Bill of Rights in their considered wisdom left this for judicial interpretation. Certainly, the drafters knew that many instances would arise concerning whether a particular search without a warrant was reasonable. Was it not within their abilities to suggest a simple rule that all searches would be unreasonable if there was time to procure a warrant? But nothing in the language of the Fourth Amendment supports the contention that a search warrant must always be secured where there is time to obtain it. *Rabinowitz*, *supra*, 339 U.S. at 65:

> "It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches."

B. The Search in the Present Case was Reasonable in View of all the Facts and Circumstances.

Petitioners maintain that the facts of this case "are virtually indistinguishable" from *Preston v. U. S.*, 376 U.S. 364, and that the considerations which led the Court to uphold the search in *Cooper v. California*, 386 U.S. 58 are "totally inapplicable" in the present case. Actually, a perusal of the opinions in *Preston* and *Cooper* and the record in this case reveals the facts and circumstances here to be more similar to those in *Cooper* than those in *Preston*.

1. *Reason for Arrest*:

First, the reasons prompting the arrest in these cases should be considered. The only information the police had in *Preston* was that three suspicious men acting suspiciously had been sitting in a parked car from 10:00 P.M. to 3:00 A.M. Upon receiving this information from a telephone complaint, the police immediately went to the place where the car was parked and accosted the three men and inquired of them their reason for being parked there. When the men gave answers which the officers deemed unsatisfactory, they were arrested for vagrancy. They were searched and then taken to police headquarters. The automobile was not searched at the scene of the arrest, but was driven from there to the police station by an officer and then later taken to a garage. A subsequent warrantless search of the car in the garage disclosed two loaded revolvers in the glove compartment and caps, women's stockings (one with mouth and eye holes), rope, illegally manufactured license plates, and other items in the trunk. Despite timely objection, these articles were introduced into evidence at petitioner's trial, which resulted in his conviction on a charge of conspiracy to rob a federally insured bank. The police in *Preston* at the outset had no reason whatever to suspect the men whom they arrested of being guilty of any serious offense. At most the only information the officers had both at the time the investigation commenced and after confronting the men in the parked car was that they were acting "suspiciously."

Unlike the arresting officers in *Preston*, the police in the present case had probable cause at the time of the arrest to believe that the petitioners had committed a serious offense, i.e., shooting into a house in Monroe County. There is no fixed definition of the term "probable cause" as it is used in justifying an arrest without a warrant. It

is the total information of which an officer is possessed. This information may be based upon what the officer is told as well as what he is able to perceive by his own senses. Probable cause exists where the facts and circumstances within an officer's knowledge, and of which he has reasonable trustworthy information, are sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed. *Brinegar v. U. S.*, 338 U.S. 160; *Carroll v. U. S.*, 267 U.S. 132.

Howard Kirkpatrick, the sheriff of Monroe County, testified in the present case that on the night of February 25, 1966, he was at the jail when a telephone call came in about a shooting at the home of Lloyd Duckett involving an automobile which was described at that time and pursuant to this his officers' broadcast a description of the involved car on their radio. (J.A. 20). The description put out over the radio, Kirkpatrick testified, matched the description of the car which he later saw at the McMinn County jail (J.A. 22) and which was identified as the car in which the petitioners were apprehended.

Lloyd Powers, a McMinn County deputy sheriff, stated that on the night in question, he was patrolling in a patrol car when he heard a call come in over a two-way radio from the Sheriff of Monroe County that there had been a shooting in a house in Monroe County. Powers recalls from the description which was broadcast that the car involved was a "kinda old make model car." As he drove toward Englewood, Tennessee, a town in McMinn County but near the Monroe County line, in response to this call, Powers met three cars. The first car was "kinda an old model car." Powers turned around then started "back after this car (referring to the first car) to see if this was the car they were looking for." (J.A. 26-28).

At this juncture it is important to note several significant facts concerning the present case. First, the auto-

mobile which Deputy Powers started to chase matched the description of the automobile which he was reliably informed had been involved in a serious offense in Monroe County, i.e., shooting into a dwelling house. Secondly, the automobile was coming from the direction of the crime. Finally, the very reason for the chase was to determine if the car and its occupants were those which the Monroe County authorities were seeking in connection with this offense. These facts distinguished this case from *Preston*, for there the officers had no reason to believe that Preston and his confederates had been involved in any serious offense when they initially sought the men arrested.

After turning around and starting the chase Powers was able to overtake the other two cars, but even though he was running from 70 to 80 miles an hour, the deputy was only able to approach within 400 to 500 feet of petitioners' fleeing automobile—"It was running at a high speed, a high rate of speed." (J.A. 28). Being unable to overtake petitioners' car, Powers radioed into the Athens city police who stopped the speeding car. Powers arrived before the three occupants, whom he identified as the petitioners herein, got out of the car. While talking to the petitioners at the scene of apprehension, the officers discovered important evidence—a bullet hole in the trunk of petitioners' car. Upon inquiry the driver replied that it had been there a long time; however, this was obviously a false statement, for Powers noted that it was a fresh bullet hole—" . . . Wasn't no rust spot or anything on the hole, . . ." (J.A. 29).

The testimony concerning the fresh bullet hole in the rear of petitioners' car is undisputed. Sheriff Calvin Cannon of McMinn County testified as follows:

"I went out and looked at the automobile and checked it and found that a bullet or —had entered into the trunk of the automobile and picked up the fragment of the bullet. It hit the frame after it went through and also a tool box and, of course, there was the fresh lead, real bright——" (J.A. 33).

Upon cross-examination Sheriff Cannon stated that in his opinion the bullet hole had to have been made that night (J.A. 34).

The discovery of the bullet hole was not the result of any unlawful search. Indeed, it is not even a "search" to observe that which is fully disclosed by mere visual observation. *United States v. Lee*, 274 U.S. 559, 563.

After petitioners' car was initially stopped on the highway and the deputy had had an opportunity to observe it closer, he called the Monroe County sheriff and indicated that he had the right car, a description of which had moments before been put out on the radio (J.A. 28).

2. *Time of the Search*:

It was about 11:00 o'clock on the night in question when Deputy Powers heard the alert broadcast on the radio. (J.A. 27). Shortly afterwards petitioners were apprehended and brought to the jail by approximately 11:30 P.M. (J.A. 33). At the jail, petitioner McKinney was placed under arrest for reckless driving and immediately thereafter Powers testified that "we went on back out at that time and searched the car." (J.A. 30). Thus, the search was substantially contemporaneous with the arrest. Certainly, it was considerably closer to the time of the arrest than the search in *Cooper*, which was conducted one week after the arrest.

It is true the Court in *Preston* indicated that, after an accused is under arrest and in custody, a subsequent

search made at another place without a warrant is not incident to the arrest. Viewed in the light of this language, the decision in *Cooper*, can only be explained in one of two ways. First, the time and place requirements incident to an arrest have been expanded or abrogated. The second explanation is that the Court now recognizes the principle that an automobile may be searched without a warrant at any time where it is validly held as evidence in a case. Either of these explanations would apply to the facts and circumstances in this case.

3. *Location of Automobile at Time of Search*:

At the scene where the petitioners' car was initially stopped police told them that they were going to take them (the petitioners) to jail and in fact took them to jail, where McKinney was advised that he was under arrest for reckless driving. Presumably, the car was driven by the police to the jail where it was parked outside and later inspected and identified by witnesses Harris and Ellis (J.A. 12, 16). No question is raised in either the *Preston* or this case of the right of the police to drive the vehicle from the place of apprehension on the highway or street to the jail.

In both *Preston* and *Cooper*, the car when searched was safely stored by the police in a garage. This being true there was no danger that any evidence could be destroyed or that the car would be removed.

> "Nor since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction." *Preston v. U. S.*, *supra*, p. 368.

In the present case, the car at the time of the search was parked outside the jail where any member of the public could come. Unlike in the *Cooper* and *Preston* cases where the vehicle searched was confined to the security of a garage, there was a risk in the present case that objects in the car, or even the car itself, might be removed by other confederates of the defendants, or by curious passers-by, or by those intending to steal an automobile parked in the open or to steal objects therefrom.

The need for the police to immediately search the car under these circumstances and even for their "own protection," as mentioned in *Cooper*, would be greater than where the car had been safely parked in a garage for a week or even for a few minutes.

This Court has often observed that the search of a moveable object, such as an automobile, may not be subject to the same stringent requirements as in the case of a fixed or immovable object, such as a house. *Carroll v. U. S.*, 267 U.S. 132; *Brinegar v. U. S.*, 338 U.S. 160.

4. *Authority for Custody of Car:*

Another important factor in the automobile cases is the authority or lack of authority for having custody of the automobile. In speaking of the *Preston* case, the majority opinion in *Cooper* states:

> "The arresting officers took the petitioners' car to the garage simply because they did not wish to leave it on the street. It was not suggested that they did this other than for Preston's convenience or they had any right to impound the car and keep it from Preston or whomever he might send for it. The fact that the police had custody of Preston's car was totally unrelated to the vagrancy charge for which they arrested him."

The automobile was properly held in the present case just as it was in *Cooper*. In *Cooper*, it was subject to being held since it was used in the transportation of narcotics and the state law required the arresting officers to seize the automobile so that it could be held as evidence of the violation of the narcotics law. The significant fact in *Cooper* was that the automobile was validly held by the police as evidence. The fact that the California statute required the automobile to be seized and held as evidence pending a final disposition of the narcotics charge is irrelevant, for a state statute obviously cannot limit the guaranties of the Federal Constitution.

The car in the present case was subject to seizure for two reasons. First, it was the instrumentality for the commission not only of the reckless driving offense, but also for the commission of a felony of which the officers had probable cause to believe the petitioners had committed. The automobile was the means by which petitioners reached the scene of the shooting. It was used in the actual shooting, and it was the means by which they fled thereby avoiding immediate apprehension. Secondly, and more important, the car was properly subject to seizure as evidence. The seizure of petitioners' automobile was justified not only by the bullet hole, but also by the fact that after the car was stopped Powers observed it and realized that it was the same car which had been described on the radio only moments before as being a car from which shots had been fired at a house.

It should be noted that there may formerly have been doubt under the so-called "mere evidence" rule whether law enforcement officials could seize articles of mere evidentiary value for use in state court proceedings; however, this uncertainty has been resolved by the recent

case of *Warden v. Hayden*, 387 U.S. 294. In this case, the Court held that the "mere evidence" rule was not a constitutional doctrine.

While the mere lawful custody of a vehicle may not of itself justify a subsequent warrantless search of the same, the total circumstances surrounding the custody may dispense with the need for a search warrant. *Cooper v. U. S., supra*:

> "While it is true, as the lower court said, that 'the lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it,' Ibid., *the reason for and nature of custody may constitutionally justify the search.*" (Emphasis supplied)

As the *Cooper* opinion notes, Preston was arrested for vagrancy—the officers had absolutely no reason to suspect Preston or his associates of committing any other offense. As has been pointed out previously, Deputy Powers had probable cause to believe the occupants had committed a serious offense. The charge in the present case was reckless driving, but in reality the reason which induced their apprehension was an honest belief based upon probable cause that they had been guilty of shooting into a house in Monroe County. Police custody of the car in Preston was totally unrelated to the vagrancy charge for which he was arrested. Police custody of the car in the present case was directly related not only to the stated grounds of the arrest, but also to the crime which induced their apprehension. The search only moments after the arrest was incident to the reason petitioners were detained and the reason the automobile was being retained. Petitioners were being held pending a further investigation of the shooting in Monroe County and the car was retained as evidence in the shooting.

5. *Conclusion*:

The search of the automobile in this case was not based solely upon the officers' information from a reliable source that an old model car had been involved in a shooting in Monroe County, but also upon the officers' effort to catch a fleeing automobile which matched the description received on the radio and which was coming from the direction of the crime, upon the observation of the fresh bullet hole, which tended to show that the automobile was recently involved in a shooting episode, and upon the statement by one of the petitioners that the hole had been there for a long time, which fact was obviously contradicted by visual inspection. These facts gave the officers reasonable cause for believing that petitioners had committed the offense in Monroe County and when viewed in light of the circumstances concerning the contemporaneousness of the search to the arrest, the location of the automobile at the time of the search, and the authority by which the police were holding the automobile, the search without a warrant was reasonable under the Fourth Amendment.

II. THE WRIT OF CERTIORARI WAS IMPROVIDENTLY GRANTED WITH RESPECT TO THE ISSUE OF PETITIONERS' RIGHT TO A JURY TRIAL FOR THE FEDERAL QUESTIONS WERE NOT RAISED OR CONSIDERED IN THE STATE COURT.

Respondent's in their brief in opposition to the petition for writ of certiorari earnestly contended that the petitioners had not raised the federal questions in the state court upon which review was sought. Nevertheless, the Court saw fit to grant the writ upon the issue of whether under the Fourteenth Amendment a defendant in a state court trial for a criminal contempt is entitled to a jury trial

where the contempt also amounts to a felony or serious offense. Respondent respectfully submits that the writ with respect to the issue of the right to a jury trial was improvidently granted and, accordingly, this issue should not be considered by this Court.

The jurisdiction of the Supreme Court in this case is based upon the third section of 28 U.S.C. § 1257; however, under this statute the Supreme Court's review is limited to the specific federal questions that were either properly raised in the state court or actually considered and determined by it. *Whitney v. California*, 274 U.S. 357, 360; *Dewey v. Des Moines*, 173 U.S. 193, 197-198.

Upon appeal to the Supreme Court of Tennessee the petitioners made the following assignment of error:

> "1. The Court erred in denying the defendants a trial by jury. See Motion for New Trial, ground No. 2 (Tr. 84). The defendants' answer demanded a trial by jury (Tr. 74). The Court noted and denied the demand for jury trial (Tr. 99). The defendants had a right to trial by jury by reason of Title 40, § 2504, Code of Tennessee (1956); Art. 1, § 6, of the Constitution of the State of Tennessee; and the 7th Amendment to the Constitution of the United States."

A party is not required to use any particular form of words or phrases in framing the federal question presented before the state court. It is only necessary "that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *Bryant v. Zimmerman*, 278 U.S. 63, 67.

In other words, the record must clearly indicate that the party seeking to invoke the jurisdiction of this Court duly sought to rely upon a particular provision of the Constitution or act of Congress. The federal issue upon which a litigant seeks Supreme Court review must have been clearly and positively presented so as to bring it unmistakenly to the attention of the state court; it cannot be left to mere inference. *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655. "It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a federal nature." *Dewey v. Des Moines, supra*, p. 199.

Clearly, petitioners were relying upon the Tennessee Constitution and state statutes in claiming that the chancellor erred in denying their demand for a jury trial. The Seventh Amendment, cited by petitioners in their first assignments of error in the state court, preserves the right to a jury trial as it existed at common law in certain cases tried in the federal courts and does not apply to trials in state courts. *Walker v. Sauvinet*, 92 U.S. 90. Even if the Seventh Amendment could be construed to be applicable to the states it would in no way be pertinent to the present case, for it deals with the right to a jury trial in a civil case. Petitioners concede this interpretation of the Seventh Amendment in footnote 29 on page 44 of their brief. Petitioners' brief clearly shows that it is the Sixth and not the Seventh Amendment which they seek to apply to this case by virtue of the Fourteenth Amendment.

Nowhere in the assignments of error in the Tennessee Supreme Court was either the Sixth or Fourteenth Amendment mentioned nor did the Court consider to what extent, if any, either of these two amendments afford the right to a jury trial in a state criminal contempt proceeding. The

issue of a right to a jury trial under the Fourteenth Amendment was not adequately raised with any degree of specificity, nor can it fairly be said that the state court passed upon the question. In the course of its opinion the Tennessee Supreme Court states:

> "Likewise, that opinion (referring to a prior Tennessee case) takes into full account the 7th Amendment to the Constitution of the United States. It is completely clear that the result we reach in this case would be the same under Federal jurisdiction." ... Tenn. ..., 410 S.W. 2d 881, 884, (J.A. 44).

Taking the view most favorable to petitioners, the portion of the opinion quoted above merely indicates that the Tennessee Court decided that under the Seventh Amendment to the Federal Constitution, which amendment very clearly does not have any application to this case, there is no right to a jury trial in a criminal contempt case. Petitioners, in their reply brief previously filed before the writ was granted, attached considerable significance to the second sentence of the portion of the opinion quoted above. If this sentence means anything, it is that petitioners' Seventh Amendment claim would not change the result if advanced in a federal court, for again the Seventh Amendment would have no pertinence to a case of this nature even if in the federal courts. Furthermore, a mere prediction by the Tennessee Supreme Court of how the federal courts would determine one federal issue does not mean that another federal question, which is now advanced by petitioners, was considered and determined by the Tennessee Supreme Court. It should also be noted that the fact the state court opinion cited *Cheff v. Schnackenberg*, 384 U.S. 373, does not mean that it passed upon or considered the federal question advanced in this court. See *Osborne v. Clark*, 204 U.S. 565, 567-8.

On page eight of their brief in this court, petitioners maintain they asserted their federal claims at all stages of the state proceedings and specifically cite page 40 of the Joint Appendix. On page 40 of the Joint Appendix petitioners have included a portion of its *brief* filed in the Supreme Court of Tennessee, which portion is entitled "Propositions of Law." The first proposition of law contains a reference to the Sixth and Fourteenth Amendments of the Federal Constitution; however, briefs filed in the state courts cannot be used to establish that a federal question was raised. *Live Oak Assn. v. Railroad Commission*, 269 U.S. 354, 357-358; *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54.

The "Propositions of Law" contained in petitioners Tennessee Supreme Court brief were included pursuant to Rule 15 of that Court which provides as follows:

> Rule 15. *Brief in support of assignments of error.*—The assignments of error must be accompanied by a brief, which shall state concisely and specifically the propositions of law and fact, without argument or elaboration, relied upon by the appellant, or plaintiff in error, to sustain the several errors assigned for reversal of the trial court. There must follow each proposition of law a citation of the authorities relied upon to sustain it, and there shall follow each proposition of fact citations to the record which are relied upon to sustain the contention of the appellant, or plaintiff in error.
>
> (1) *This brief must be filed in all cases.*—It may be combined with the assignments of error, or filed in separate form. An argument will not supply the place of a brief.

> (2) *Case affirmed when assignments of error not filed.* —When appellants, or plaintiffs in error, in civil cases, fail or refuse to file an assignment of errors and brief, as required by this rule, it will be taken as an abandonment of the appeal or writ of error, and the decree or judgment will be affirmed. Errors not assigned and supported by brief according to this rule, will be treated as waived, but the court, in its discretion, may notice an error overlooked by counsel.

Clearly, the clause, ". . . which shall state concisely and specifically the propositions of law . . .," refers to the brief which must accompany the assignments of error (which petitioners labeled "Specifications of Error") and not to the assignments of error themselves. Thus, the material appearing on page 40 of the Joint Appendix under "Propositions of Law" is a part of petitioners' brief, and not part of the technical record, and cannot be relied upon to show that a federal question was properly raised in the state court.

If any portion of the brief may be relied upon, then there would be no reason why the entire brief may not be considered in determining whether the issue of a right to a jury trial under the Fourteenth Amendment was adequately presented to the state court. In this regard respondent welcomes a review by the Court of the entire brief filed by petitioners in the Supreme Court of Tennessee. The brief was filed with petitioners' original assignments of error and presumably is filed with the record in this court. In view of petitioners' sole contention that at common law there was a right to a jury trial for indirect contempts, respondent respectfully submits that the only issue before the state court was whether the Tennessee Constitution and statutes afforded a jury trial in such cases.

Even if it could be said that the issue now before the Court was assigned as error in the state court, respondent

submits, it was not in any way supported by brief and would therefore have been treated as waived by the Tennessee Supreme Court under its Rule 15(2), *supra*. The requirement of Rule 15(2) that all assignments of error must be supported by brief or otherwise will be treated as waived is reasonable. The rules of state appellate practice must be followed even with respect to federal rights. *John v. Paullin*, 231 U.S. 583, 585:

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law."

In *Beck v. Washington*, 369 U.S. 541, the petitioner maintained that a state statute allowing persons in custody to challenge grand jurors denied equal protection to those persons who were not in custody, but were being investigated by the Grand Jury. Petitioner Beck failed to adequately specify the equal protection contention in his assignments of error before the Washington Supreme Court. Washington case law has developed a rule similar to Rule 15(2) of the Supreme Court of Tennessee. Noting Beck's failure to advance this constitutional argument in the brief before the Supreme Court of Washington, this Court, citing Washington cases, stated:

> "Moreover, the failure of petitioner to argue the constitutional contention in his brief, as opposed to merely setting it forth as he did in one sentence of his 125 page brief, is considered by the Washington Supreme Court to be an abandonment or waiver of such contention." 369 U.S. at 553.

In the present case, the petitioners' brief in the Tennessee Supreme Court consisted of 42 pages and the only reference to the Sixth and Fourteenth Amendments in regard to the right to a jury trial was in the introductory portion of the brief entitled "Propositions of Law" (J.A.40). In the textual portion of the brief relating to the jury trial issue respondent finds absolutely no reference to the Sixth Amendment, the Seventh Amendment or the Fourteenth Amendment or, for that matter, even a vague reference to the United States Constitution.

This Court has consistently refused to entertain jurisdiction of federal questions where reasonable state procedural requirements have not been observed. Even where the highest state tribunal makes no comment on the federal question, the Court has assumed that the silence is due to the procedural deficiency. *Bailey v. Anderson*, 326 U.S. 203, 206-207. Assuming arguendo petitioners properly raised the federal jury issue now advanced, it must further be assumed that their failure to support this contention in their brief was treated by the Tennessee Supreme Court as waived. Under this assumption the failure of the Court to discuss the right to a jury trial under the Sixth and Fourteenth Amendments must have been due to petitioners' procedural deficiency in complying with Rule 15(2).

The sole federal question raised by petitioners' first assignment of error in the Tennessee Supreme Court related to whether or not under the Seventh Amendment petitioners were entitled to a jury trial in a criminal contempt case. Indeed, there was no mention of the Sixteenth Amendment in the first assignment of error. The reference to the Seventh Amendment, however, will not support the issues which, for the first time, petitioners seek to

raise before this Court. In *Chapin v. Fye*, 179 U.S. 127, the Court held that issues raised in the state proceedings under the Fifth Amendment and Seventh Amendment of the Federal Constitution would not support an argument in the Supreme Court based upon the due process clause of the Fourteenth Amendment.

Considering only the questions before it, the Tennessee Supreme Court properly held that under the state constitution and statutes the petitioners were not entitled to a jury trial and that the Seventh Amendment of the United States Constitution does not require a state to grant a jury trial in contempt cases. Since petitioners neither set up in the record the jury issues relating to the Sixth and Fourteenth Amendments which they now raise or in any way alluded to them, it cannot be said that they were "brought to the attention of the state court with fair precision." Nor can it be said that the state court denied the claims now made by petitioners. "A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it." *Dewey v. Des Moines*, *supra*, p. 200.

Since the federal jury issues upon which the writ of certiorari was granted were neither raised by petitioners in the state proceedings nor in any way considered or decided by the state court, the Supreme Court lacks jurisdiction to consider them. Accordingly, the writ of certiorari as to the jury trial issue should be dismissed as improvidently granted.

III. PETITIONERS WERE NOT ENTITLED TO A JURY TRIAL.

In considering petitioners claim of a constitutional right to a jury trial in the criminal contempt proceeding in the

state court it is necessary first to ascertain if the Sixth Amendment guaranty of a trial by jury applies to criminal contempt cases in the federal courts where the conduct alleged as contempt amounts to a felony. Respondent argues that it does not, and, if in fact it does not, then obviously petitioners' position would be untenable. If the Court should conclude that the Sixth Amendment does apply to such contempt proceedings in the federal courts, it would be necessary then to determine if the Fourteenth Amendment makes the jury trial guaranty of the Sixth Amendment obligatory upon the states in criminal contempt cases involving felonious conduct.

A. The Sixth Amendment Does Not Create a Right to a Jury Trial in Criminal Contempt Proceedings Involving Conduct Which is a Felony.

Petitioners in the present case were held in contempt of court for disobeying an injunction issued by a chancellor in a state court. Since the acts constituting the contumacious conduct would also amount to a felony under state law, petitioners maintain they were entitled to a jury trial in the contempt proceeding under the Sixth Amendment which, they contend, is made applicable to the states by virtue of the Fourteenth Amendment.

Only until very recently has any serious doubt been raised concerning the constitutionality of the power of courts, both state and federal, to summarily punish for criminal contempt. Thus, as late as 1958 in *Green v. United States*, 356 U.S. 165, the Supreme Court reemphasized the absolute exemption of criminal contempt cases from the requirements of a jury trial afforded under Article 3 and the Sixth Amendment.

> "The statements of this Court in a long and unbroken line of decisions involving contempts ranging from mis-

behavior in court to disobedience of court orders establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right. ... The principle that criminal contempts of court are not required to be tried by a jury under Article 3 or the Sixth Amendment is firmly rooted in our traditions." 356 U.S. at 183-184.

Mr. Justice Frankfurter in his concurring opinion in *Green* noted the long judicial acceptance of the power to punish summarily for criminal contempt and succinctly observed:

"... from the foundation of the United States the constitutionality of the power to punish for contempt without the intervention of a jury has not been doubted. ... Nor has the constitutionality of the power been doubted by this Court throughout its existence. In at least two score cases in this court, not to mention the vast mass of decisions in the lower federal courts, the power to punish summarily has been accepted without question. ... To say that everybody on the Court has been wrong for 150 years and that that which has been deemed part of the bone and sinew of the law should now be extirpated is quite another thing. ... It is not for this Court to fashion a wholly novel constitutional doctrine that would require such participation [of a jury] whatever Congress may think on the matter, and in the teeth of an unbroken legislative and judicial history from the foundation of the Nation." 356 U.S. at 190, 192, 193.

Six years later in *United States v. Barnett*, 376 U.S. 681, the Court was again confronted with the contention that those charged with criminal contempt are entitled to a jury trial under the Constitution. In denying the existence of this constitutional claim the Court stated:

> "This claim has been made and rejected here again and again. ... It has always been the law of the land, both state and federal, that the courts—except where specifically precluded by statute—have the power to proceed summarily in contempt matters." 376 U.S. at 692.

By way of footnote dictum the *Barnett* opinion noted that "some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." 376 U.S. at 695.

The *Barnett* dictum was extended in the case of *Cheff v. Schnackenberg*, 384 U.S. 373, where the Court under its supervisory power announced that sentences for criminal contempt in federal courts could not exceed six months imprisonment unless a jury trial is granted or waived.

As petitioners note, much has been written on the subject of summary criminal contempt proceedings. Some scholars have attempted to show that the English authority for summarily punishing indirect contempts without a jury was of dubious validity; however, as the opinion in *Green* observes:

> "[W]hatever the breadth of the historical error said by contemporary scholarship to have been committed by English courts of the late Seventeenth and Eighteenth Centuries in their interpretation of English precedents involving the trials of contempts of court, it at least seems clear that English practice by the early Eighteenth Century comprehended the use of summary powers of conviction by courts to punish for a variety of contempts committed within and outside court." 356 U.S. at 185.

Mr. Justice Harlan concluded, *Id.* at 186:

> "Against this historical background, this Court has never deviated from the view that the constitutional guarantee of trial by jury for 'crimes' and 'criminal prosecutions' was not intended to reach to criminal contempts."

Barnett recognized that some Colonies had enacted statutes restricting the imposition of summary punishment for contempt to only trivial offenses, but the opinion points out that these colonial statutes cannot be regarded as establishing a standard which would permit the summary contempt power to be exercised only with respect to offenses classified as trivial, as the petitioners in the present case would have the Court limit the power. The best answer to the contention that the power to punish summarily for contempt at common law was limited to trivial offenses is, as Mr. Justice Clark in *Barnett* observed, "the Judiciary Act of 1789 which provided that the courts of the United States shall have power to 'punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same.'" 376 U.S. at 693. Speaking further of the Judiciary Act of 1789, the Court in *Barnett* says, "it is undisputed that this Act gave federal courts the discretionary power to punish for contempt as that power was known to the common law." 376 U.S. at 687.

Not only is the power to punish summarily for contempt recognized from a historical standpoint, but this Court has noted it is necessary in order for a court to compel obedience to its orders. *In re Debs*, 158 U.S. 564, 594-595:

> "Nor is there ... any invasion of the constitutional right of trial by jury. ... [T]he power of a court to

> make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

Traditionally, criminal contempt proceedings have been described as *sui generis*, i.e., possessing some of the qualities of both civil and criminal wrongs. In *Myers v. United States*, 264 U.S. 95, the Court noted that "while contempt may be an offense against the law and subject to appropriate punishment," since the formation of our government, "proceedings to punish such offenses have been regarded as *sui generis*, and not 'criminal prosecutions' within the Sixth Amendment or common understanding." *Id.* at 104-105. Nor have contempt proceedings been deemed to be "crimes" or "infamous crimes" within the meaning of Article 3 or the Fifth Amendment. See *Green v. United States*, *supra*, p. 184-186. While it is true the Court has held many of the procedural safeguards accorded a defendant in a criminal trial applicable to a summary contempt proceeding still both at common law and throughout the history of this Court in interpreting the Sixth Amendment, the summary disposition of contempts has been upheld "*without reference to any distinction based on the seriousness of the offense.*" *United States v. Barnett*, *supra*, p. 694. (Emphasis supplied.)

Since their contumacious conduct also amounts to a felony under state law, petitioners maintain they are entitled to a jury trial in the contempt proceeding because

they would have been entitled to a jury trial if they had been tried in criminal court under an indictment arising out of the same acts. This argument is based upon a misapprehension of the nature of the contempt proceedings. Of course, the violation of the injunction was, as the petitioners contend, also a felony, but it was the violation of the court order for which petitioners were summarily tried and not the criminal act of firing a missile into another's house. If guilty, the punishment could only be that allowed for contempt and not that imposed for a felony. The possibility of another proceeding does not of itself afford the right to a jury trial. For example, if a man drives an automobile negligently and kills another, he may be guilty of manslaughter, and if he is so charged, he is entitled to all the protections of the criminal law. On the other hand, if he is in fact charged before a magistrate with speeding or running a "stop" sign, he cannot be heard to complain that he is entitled to a jury trial simply because he could be tried for manslaughter upon the identical facts.

Petitioners rely upon both *Callan v. Wilson*, 127 U.S. 540 and *District of Columbia v. Colts*, 282 U.S. 63, to support their contention that a jury trial must be afforded in criminal contempt proceedings where the nature of the offense alleged as contempt also constitutes a serious offense under state or federal law. In both *Callan* and *Colts* the defendant was charged with a *crime* as such; neither involved a contempt. In the present case petitioners were tried for violating a court order, but in *Callan* and *Colts* the defendants were tried for a specific violation of the criminal laws. The Court in *Callan* noted that there was a class of offenses tried at common law without a jury, but concluded that conspiracy, the offense for which the defendant was charged, was not among them. 127 U.S. at 555.

Just as the reason for the "nature of the offense" test developed in *Callan* and *Colts* is based upon history, so too the reason for denying jury trials in criminal contempt proceedings emanates from historical roots. At common law the power to punish summarily for contempts—both direct and indirect—was well established. See *Green v. United States*, *supra*, p. 185. But petitioners now ask this Court to ignore this portion of the common law as if it never existed and "to say that everybody on the Court has been wrong for 150 years." *Id.* at 193 (Frankfurter, J., concurring). As Mr. Justice Clark observed in the appendix to his opinion for the majority in *United States v. Barnett*, *supra*, p. 701: "... we find no basis for a determination that, at the time the Constitution was adopted, contempt was generally regarded as not extending to cases of serious misconduct."

Finally, it should be noted that some members of the Court have observed that the penalties for contempt at the time the constitution was adopted were relatively minor, and, therefore, this historical background would not justify the relatively recent practice of imposing lengthy imprisonments in contempt cases without a trial by jury. See *United States v. Barnett*, *supra*, p. 740 (Goldberg, J., dissenting), and *Cheff v. Schnackenberg*, *supra*, pp. 384-385 (Douglas, J., dissenting). To the extent that this argument is valid in requiring jury trials in those contempt cases in which serious punishment may be imposed, it would have no application at all to the facts in this case, for Tennessee has long limited the power of its courts to punish for contempt to a fine of $50.00 and/or imprisonment not exceeding ten days. See Tennessee Code Annotated, § 23-903.

Accordingly, it does not appear that the Sixth Amendment prohibits the federal courts, and *a fortiori* the state

courts, from exercising summary power in criminal contempt cases even where the alleged contempt amounts to a felony or is otherwise a serious offense.

B. The Fourteenth Amendment Does Not Make the Sixth Amendment's Jury Trial Guarantee Obligatory Upon the States.

The Supreme Court has consistently held that the Fourteenth Amendment does not require the states to afford a jury trial in criminal cases. Indeed, no provision of the Federal Constitution expressly guarantees the right to a jury trial in any case, criminal or civil, triable in the state courts. Furthermore, "the commandments of the Sixth and Seventh Amendments, which require jury trial in criminal and certain civil cases, are not picked up by the due process clause of the Fourteenth so as to become limitations on the states. 'This Court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether.' (citation omitted)." *Fay v. New York*, 332 U.S. 261, 288. See also *Irvin v. Dowd*, 366 U.S. 717, 721.

It is true that this Court in several recent and very significant decisions has held some of the guaranties of the Sixth Amendment obligatory upon the states by virtue of the Fourteenth Amendment. In *Gideon v. Wainwright*, 372 U.S. 335, the right to assistance of counsel for an accused in a criminal prosecution was held applicable to the states. Similary, *Pointer v. Texas*, 380 U.S. 400, applied the Sixth Amendment's right of an accused to be confronted with the witnesses against him to the states by virtue of the Fourteenth Amendment. Thus, as stated in *Pointer* "it no longer can broadly be said that the Sixth Amendment does not apply to state courts." *Id.* at 406.

Respondent does not maintain, and certainly the language in *Fay v. New York*, *supra*, does not suggest, that none of the guaranties of the Sixth Amendment apply to the states. But respondent does submit that even if the Court should construe the Sixth Amendment as requiring federal courts to grant a trial by jury in all criminal contempt proceedings where the alleged contumacious conduct constitutes a felony, the Fourteenth Amendment would not necessarily require the application of such a holding to the states.

In *Gideon* and *Pointer*, as well as other cases imposing portions of the Sixth Amendment's guaranties upon the states, the Court stressed the fact that the rights which were being applied to the states were "fundamental and essential to a fair trial." *Gideon*, *supra*, p. 342. See also *Pointer*, *supra*, p. 405. The issue then becomes whether the right to a trial by jury is a fundamental right which is essential to a fair trial. To say that trial by jury is a fundamental right in criminal contempt cases, is not only to ignore the historical conclusions to the contrary and to hold that this Court has been wrong for over 150 years as have most state courts, but it is also to conclude that state judges are incapable of summarily trying criminal contempt cases fairly. Respondent cannot adopt this conclusion, and, accordingly, respectfully submits that the Fourteenth Amendment does not require the Sixth Amendment's guarantee of jury trials to be imposed upon the states in any criminal contempt proceedings.

Assuming arguendo that the Sixth Amendment does apply to the states in cases of this nature, respondent insists that in view of the very severe limitation upon the extent of punishment which a Tennessee court can decree for contempt, the present case must be regarded as equivalent to a prosecution of a petty offense. Obviously, the

Tennessee legislature deems contempt as in the nature of a petty offense, for only a minor penalty may be imposed upon one guilty of a contempt. To hold that a state court cannot inflict a ten-day prison sentence for contempt without offering a jury trial, but that a federal court can impose a ninety-day imprisonment without a trial by jury is somewhat anomalous, especially when it is remembered that the Sixth Amendment's jury guarantee specifically applies to the federal courts, but only questionably applies to the state courts.

CONCLUSION

For the foregoing reasons, respondent submits that the decision of the Supreme Court of Tennessee should in all aspects be affirmed.

Respectfully submitted,

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December 28, 1967

AFFIDAVIT OF SERVICE

I, S. Randolph Ayres, of counsel for the Respondent, being first duly sworn according to law, depose and say:

Pursuant to Rule 33, Paragraph 3(c), of the Supreme Court of the United States, I have this ..... day of December, 1967, served a true and exact copy of the foregoing Brief for Respondent upon Bernard Kleiman, 10 South LaSalle Street, Chicago, Illinois, Elliot Bredhoff, Michael Gottesman, and George H. Cohen, 1001 Connecticut Avenue, N.W., Washington, D. C., and George Longshore, Cooper, Mitch & Crawford, 1025 Bank of Savings Building, Birmingham, Alabama, by depositing same in the United States Post Office or mail box, with first class air mail postage prepaid, addressed to said counsel at their respective addresses, and upon Tom J. Taylor, Athens, Tennessee, by depositing same in the United States Post Office or mail box, with first class postage prepaid, addressed to his Post Office address.

.....

S. RANDOLPH AYRES

Sworn to and subscribed before me
this ..... day of December, 1967.

.....

Notary Public

My Commission Expires: .....

SUPREME COURT, U. S.
JAN 6 1968
JOHN F. DAVIS, CLERK

No. 149

IN THE

Supreme Court of the United States

October Term, 1967

WAYNE DYKE, ED MCKINNEY AND JOHN BLACKWELL,
Petitioners,

v.

TAYLOR IMPLEMENT MANUFACTURING COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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IN THE

Supreme Court of the United States

October Term, 1967

No. 149

WAYNE DYKE, ED MCKINNEY AND JOHN BLACKWELL,
Petitioners,

v.

TAYLOR IMPLEMENT MANUFACTURING COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF TENNESSEE

REPLY BRIEF FOR PETITIONERS

Respondent's brief makes a number of assertations regarding the "search and seizure" issue which we believe warrant reply. In addition, respondent contends that the "jury trial" issue was not properly presented to the court below, and we wish to demonstrate the incorrectness of that claim.

I. SEARCH AND SEIZURE

A. *The Proper Standard: McDonald*

Our principal argument is that this Court should adopt, as the test of "reasonableness" for all searches without a warrant, the standard enunciated in *McDonald* v. *United States,* 335 U.S. 451, 455 (1948): that a search without a warrant is unreasonable unless "the exigencies of the situation" preclude the delay necessary to obtain a warrant.

Respondent (brief, p. 6) characterizes *McDonald* as

a discredited decision espousing a discredited doctrine. *McDonald* cannot be so lightly brushed away. While, to be sure, *McDonald* was impliedly overruled in *Rabinowitz*,[1] 339 U.S. 56 (1950), it has enjoyed a better fate in recent years. *McDonald* has been cited by this court in support of the invalidation of warrantless searches in several post-*Rabinowitz* decisions. *United States* v. *Jeffers*, 342 U.S. 48, 51 (1951); *Jones* v. *United States*, 357 U.S. 493, 498 (1958); *Silverman* v. *United States*, 365 U.S. 505, 511 (1961). In *Regaldo* v. *California*, 374 U.S. 497 (1963), the Court remanded a case to a state court "for further consideration in light of . . . *McDonald*"—hardly the fate of a discredited doctrine.[2] See also *Warden v. Hayden*, 387 U.S. 294, 298 (1967); *Katz* v. *United States*, 36 U.S. L. Week 4080, 4082 n. 19 (Dec. 18, 1967).

Respondent's lengthy explanation (Resp. brief, pp. 9-16) of why the search in the present case was "reasonable" re-

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[1] *Rabinowitz*, 339 U.S. at 66, expressly overruled *Trupiano* v. *United States*, 334 U.S. 699 (1948). *Trupiano*, which was decided a few months before *McDonald*, was one of a series of cases enunciating the same doctrine as was expressed in *McDonald* (see the cases cited in our opening brief, pp. 14-15). In rejecting the doctrine, *Rabinowitz* impliedly overruled all of these decisions. Mr. Justice *Frankfurter* so noted in his dissent in *Rabinowitz*, 339 U.S. at 85.

Ironically, *Trupiano* was probably incorrectly decided even under its own doctrine. The items seized in *Trupiano* were in open view at the time of arrest and, as Mr. Justice Frankfurter explained in his dissent in *Rabinowitz*, there is no Fourth Amendment protection for items in open view (339 U.S. at 75). It was this ironic factor which led us to adopt *McDonald*, rather than *Trupiano*, as the representative of the doctrine we espouse. We were not motivated, as respondent suggests (brief, p. 6), by a desire to conceal *Rabinowitz*' purported overruling of the doctrine. On the contrary our opening brief (p. 16) acknowledged that *Rabinowitz* purported to do so.

[2] *Regaldo* was decided one week after *Ker* v. *California*, 374 U.S. 23 (1963), in which this Court announced that federal standards govern the reasonableness of searches by State officers. *Regaldo* was thus remanded for reevaluation in light of the federal standards. Apart from *Ker*, the only case cited as representative of those federal standards was *McDonald*.

inforces, we believe, the need for a standard of simple, uniform application. Plainly, if reasonableness turns on the fine lines and distinctions proffered by respondent, warrantless searches will continue to be conducted in a veritable wilderness, with no one certain, until the case reaches this Court, whether the search was lawful. A district judge, confronted with the task of distinguishing *Preston*[3] from *Cooper*,[4] recently lamented "this complex area of search and seizure, where hairline distinctions at times seem to govern to the dismay of many." *United States* v. *Kuntz*, 265 F. Supp. 543, 544 (N. D. N. Y. 1967). For evidence that the courts of appeals are finding the task no easier, *cf. Weaver* v. *Lane*, 382 F. 2d 251 (7th Cir. 1967) (validating search) *with ibid*, at p. 255 (dissenting opinion of Chief Judge Hastings) and *Williams* v. *United States*, 382 F. 2d 48 (5th Cir. 1967) (invalidating search).

B. *Applying McDonald to the Facts of This Case.*

In an effort to bring this case within the *McDonald* rule, respondent argues that there *were* practical considerations precluding the delay necessary to obtain a warrant (Resp. brief, p. 13):

> "In the present case, the car at the time of the search was parked outside the jail where any member of the public could come . . . [T]here was a risk in the present case that objects in the car, or even the car itself, might be removed by other confederates of the defendants, or by curious passers-by, or by those intending to steal an automobile parked in the open or to steal objects therefrom."

These "risks" have never justified foregoing a warrant. As this Court has so often recognized, the police need only

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[3] *Preston* v. *United States*, 374 U.S. 364 (1964).
[4] *Cooper* v. *California*, 386 U.S. 58 (1967).

have kept the car under surveillance while the warrant was being obtained—hardly an imposition, as the car was parked right outside the jail. See, e.g. *Taylor* v. *United States,* 286 U.S. 1, 6 (1932) ("a short period of watching would have prevented any such possibility"); *United States* v. *Jeffers,* 342 U.S. 48, 52 (1951) ("the officers admit they could have easily prevented any such destruction or removal by merely guarding the door"); *Chapman* v. *United States,* 365 U.S. 610, 613-16 (1961).

C. *If McDonald Is Not the Governing Standard.*

If this Court does not adopt McDonald as the uniform standard applicable to all searches without a warrant, the question becomes whether "in the facts and circumstances" of this case the search was "reasonable." *Rabinowitz, supra.* We showed in our opening brief (pp. 27-31) that the decision in *Preston* dictates that a search conducted without a warrant in the circumstances of this case is not "reasonable." Respondent assails our view so vigorously, however, and with such imaginative distortion of the record and the precedents, that further discussion is required.

1. Respondent's Interpretation of *Cooper*.

Fundamental to respondent's contentions is its proffered interpretation of *Cooper* v. *California,* 386 U.S. 58 (1967), which appears at page 12 of its brief:

> "[T]he decision in *Cooper* can only be explained in one of two ways. First, the time and place requirements incident to an arrest have been expanded or abrogated. The second explanation is that the Court now recognizes the principle that an automobile may be searched without a warrant at any time when it is validly held as evidence in a case."

We think it clear that *Cooper* stands for neither of these propositions. Rather, the factor which distinguished *Cooper* from *Preston* was that police officers were required by state

law to seize the car and to hold it for forfeiture proceedings (386 U.S. at 61-62):

> "This case is neither *Preston* nor controlled by it. Here the officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car,—whether the State had 'legal title' to it or not—was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained. The forfeiture of petitioner's car did not take place until over four months after it was lawfully seized. It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it . . . Under the circumstances of this case, we cannot hold unreasonable under the Fourth Amendment the examination or search of a car validly held by officers for use as evidence in a forfeiture proceeding."

Thus *Cooper* does not stand for the propositions attributed to it by respondent.[5] Nor should this Court now adopt these

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[5] In fairness to respondent, however, we should note that many lower courts have read *Cooper* even more expansively, in effect to authorize searches of automobiles any time, any place, following an arrest of the driver. Some of these cases have asserted that *Cooper* overruled *Preston*. *People* v. *Webb*, 56 Cal. Rep. 902, 424 P. 2d 342 (1967); *ibid*, 424 P. 2d 356 (concurring opinion); *Stewart* v. *People*, 426 P. 2d 545 (Colo. Sup. Ct. 1967); *State v. Houchin*, 428 P. 2d 971 (Mont. Sup. Ct. 1967); *Abrams* v. *State*, 223 Ga. 216, 154 S.E. 2d 443 (1967); *State* v. *Omo*, 199 Kan. 167, 428 P. 2d 768 (1967); *State* v. *Boykins*, 50 N. J. 73, 232 A. 2d 141 (1967); *Draper* v. *Maryland*, 265 F. Supp. 718 (D. Md. 1967); *Davidson* v. *Boles*, 266 F. Supp. 645 (N. D. W. Va. 1967). *Contra: State* v. *Johnson*, 427 P. 2d 705 (Wash. Sup. Ct. 1967); *Williams* v. *United States*, 382 F. 2d 48 (5th Cir. 1967); *Weaver* v. *Lane*, 382 F. 2d 251, 255 (7th Cir. 1967) (dissenting opinion).

propositions and expand further the areas in which warrantless searches are permitted. As this Court said so recently in *Katz, supra,* while rejecting a different proposal for expansion:

> "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," *United States* v. *Jeffers,* 342 U.S. 48, 51, and that *searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment*—subject only to a few *specifically established* and *well-delineated* exceptions." (36 U.S. .L Week 4080, 4082, emphasis added).

Moreover, as we now show, even the expansion sought by respondent would not validate the search in the facts and circumstances of this case. Respondent advances three bases for sustaining the search. We deal with each in turn.

2 The Bases Advanced by Respondent to Justify the Search.

a. *The search as incident to an "arrest" which could have been made for the shooting.* Respondent repeatedly suggests that Sheriff Powers, when he decided to chase and stop petitioners' car, had a detailed description of the car involved in the shooting and recognized petitioners' car as fitting that description (Resp. brief, pp. 3-4, 10; 14, 16). This is contrary to Sheriff Powers' testimony (J.A. 27):

> "Q. (By Mr. Carter) Did you get a description of the automobile [involved in the shooting]?
>
> "A. Not exactly. All I got is just that it would be an old make model car. Kinda old make model car."

Thus, when he stopped petitioners' car, Sheriff Powers knew only that it, like the shooters' car, was an old make; that it was speeding; and that it was coming from the direction of—albeit several miles away from—the shooting.

Clearly, this did not constitute "probable cause" to believe that petitioners were involved in the shooting.[6] Indeed, it is obvious that Sheriff Powers did not believe he had such probable cause, for he did not arrest them for the shooting. Thus respondent's repeated contention (brief pp. 8, 14, 15, 16) that the search could be justified as incident to an arrest for the shooting—an arrest which never was made—is plainly untenable. Significantly, the court below did not rely on any such theory in upholding the search (J.A. 45). Respondent insists that: "The charge in the present case was reckless driving, but in reality the reason which induced their apprehension was an honest belief based upon probable cause that they had been guilty of shooting into a house in Monroe County" (Resp. brief, p. 15). Plainly, if Sheriff Powers had had "an honest belief based upon probably cause" that petitioners had been involved in the shooting, he would have arrested them for that crime. It probably *is* true, however, as respondent suggests, that the reckless driving arrest was merely a pretext to get petitioners and the car to the station house. Undoubtedly, Sheriff Powers wanted to search the car in the hope that he would find sufficient evidence to justify an arrest for the shooting. It is well settled, however, that searches may not be conducted without warrant, simply because there is a probability that incriminating evidence will be found. As this Court said so recently in *Katz* v. *United States,* 36 U.S. L. Week 4080, 4082 (Dec. 18, 1967), "this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end."

Finally, even if a search would have been justified at the

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[6] After the car was stopped, Sheriff Powers observed a fresh bullet hole in the back (J.A. 29) but he had received no report that the car from which shots were fired had received a return volley, and thus had no basis at that time for relating the bullet hole to the shooting.

time the car was stopped on the theory asserted by respondent, that would not justify the later search at the police station. *Preston,* 376 U.S. 367-68:

> "Here, we may assume, as the Government urges, that, either because the arrests were valid or because the police had probable cause to think the car stolen, the police had the right to search the car when they first came on the scene. *But this does not decide the question of the reasonableness of a search at a later time and at another place.*" (Emphasis added.)

b. *The search as incident to an arrest at the jail.* In an effort to make the search more proximate to the arrest, respondent argues (brief, p. 11) that petitioners were not arrested until they arrived at the jail. This contention, too, will not survive analysis.

Sheriff Powers testified that after stopping the car, he "advised" petitioners that he "was going to take them on to the jail" (J.A. 40). While petitioners were not told until they arrived at the jail what the *ground* for arrest was (i.e. reckless driving), they were under arrest from the moment they were "advised" (not *asked*) that they were being taken to the jail. *Henry* v. *United States,* 361 U.S. 98, 103 (1959). Cf. *Rios* v. *United States,* 364 U.S. 253, 261-62 (1960). The police cannot validate a search "at a later time and at another place" (*Preston, supra*) by the expedient of "re-arresting" the person when ready to begin the search.

Moreover, even if the reckless driving arrest were deemed to have taken place at the jail, this would not justify searching the car as "incident" to that arrest. Such searches are permitted only "in order to find and seize things connected with the crime as its fruits, or as the means by which it was committed, as well as weapons and other things to effect an escape from custody", *Agnello* v. *United States,* 269 U.S. 20, 30 (1925). But "there are no fruits of speeding", *United*

States v. *Tate*, 209 F. Supp. 762, 763, 765 (D. Del. 1962), *cf. Preston*, 376 U.S. at 368, and that, in essence, is all that petitioners were arrested for. Nor could there have been, within the car, evidence of the crime for which petitioners were arrested. And, clearly, the police could not have feared that petitioners might utilize weapons within the car to effect an escape, for petitioners were under detention within the jail.

In addition, this Court has never held that the scope of an incidental arrest can extend beyond the premises within which the arrest was made. Thus, even if the police could search the jail, as the place in which the arrest occurred, they could not go outside and search the car as incidental to the arrest.

c. *The search justified because the car was evidence.* Finally, respondent argues (pp. 13-15) that the car was "evidence" of the shooting, and that under *Cooper* the police may search any car being held as evidence of a crime. The facts will not support this theory, however. Petitioners were under arrest solely for reckless driving. The car was not evidence of that crime. At its broadest, *Cooper* authorized only the search of cars held as evidence of "the crime for which they arrested petitioners" (386 U.S. at 61), and *Preston* was expressly distinguished on the ground that "the fact that the police had custody of Preston's car was totally unrelated to the vagrancy charge for which they arrested him" (*ibid*). Indeed, there is no evidence here that the police were holding the car as "evidence" of anything, or even that they were holding it at all.[7] The record shows only that, petitioners having been taken to the jail in a police car, the police arranged to have the car towed to the jail. We think the most probable explanation is that the car was taken to the jail so that the police could conduct an

[7] Petitioners were never criminally tried for the shooting, and even in this contempt case the car was not introduced as "evidence."

exploratory search, in the hope that evidence would be uncovered linking petitioners to the shooting. As we have already shown, that is the classic situation in which a search without warrant is forbidden.

II. JURY TRIAL: THE ISSUE WAS PROPERLY RAISED BELOW

Respondent's contention (pp. 16-24) that the jury trial issue was not properly raised below is preposterous.

Rule 15 of the Supreme Court of Tennessee requires an appellant to file "assignments of error" which must be accompanied by "a brief, which shall state concisely and specifically the propositions of law . . . without argument or elaboration, relied upon by the appellant . . . There must follow each proposition of law a citation of the authorities relied upon to sustain it."

In accordance with these requirements, appellants (petitioners here) filed as one of their assignments of error that "the Court erred in denying the defendants a trial by jury" (J.A. 39), and in the accompanying brief[8] they stated the first proposition of law as follows (J.A. 40):

[8] The assignments of error and the brief were actually combined in a single document, as authorized by Rule 15(1) of the court below.

"PROPOSITION OF LAW I

"In cases of contempt of court committed outside the presence of the court there is a constitutional and statutory right to trial by jury.

"Tennessee Code Ann., ch. 21, § 1011.

"Tennessee Constitution, Art 1, § 6.

"U.S. Constitution, Amendment VI.

"U.S. Constitution, Amendment XIV." (Emphasis added.)

Appellants thus did precisely what the Rules of the Tennessee Supreme Court require, and the Sixth and Fourteenth Amendments were cited precisely where they should have been: in the Propositions of Law. That the court below fully understood the issue, and passed upon it, is evident from its citation of and reliance upon *Cheff* v. *Schnackenburg*, 384 U.S. 383 (1966), the most current decision of this Court discussing whether the Sixth Amendment creates a right to jury trial in criminal contempt proceedings (J.A. 44). The decision below expresses no dissatisfaction with the manner in which the issue was raised and presented.

Respondent's complaints are wide of the mark. It contends (pp. 21-22) that the Sixth Amendment should have been cited in the assignments of error, rather than the accompanying propositions of law. But the rules of the court below do not provide for citations of authority in the assignment of error; rather, Rule 15 provides that such citations must appear in the propositions of law.

Respondent next insists (pp. 22-23) that merely citing the Sixth Amendment in the propositions of law was insufficient; it should have been elaborated upon at length. But Rule 15, quoted above, provides precisely to the contrary. Briefs are to be "without argument or elaboration."

The jury trial issue was properly presented to the court below, was passed upon on the merits, and is properly here.

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SUPREME COURT OF THE UNITED STATES

No. 149.—October Term, 1967.

Wayne Dyke et al., Petitioners, v. Taylor Implement Mfg. Co., Inc. } On Writ of Certiorari to the Supreme Court of Tennessee, Eastern Division.

[May 20, 1968.]

Mr. Justice White delivered the opinion of the Court.

Petitioners Wayne Dyke, Ed McKinney, and John Blackwell were found guilty of criminal contempt by the Chancery Court of McMinn County, Tennessee. All three were given the maximum sentence authorized by statute, 10 days in jail and a $50 fine.[1] The Tennessee Supreme Court affirmed,[2] rejecting contentions that the convictions violated the Federal Constitution because jury trial was denied[3] and because testimony concerning

[1] Tenn. Code Ann. § 23-903 (1955): "The punishment for contempt may be by fine or imprisonment, or both; but where not otherwise specially provided, the circuit, chancery, and appellate courts are limited to a fine of fifty dollars ($50.00), and imprisonment not exceeding ten (10) days, and all other courts are limited to a fine of ten dollars ($10.00)."

[2] *Sub nom. Taylor Implement Mfg. Co., Inc.* v. *United Steelworkers of America*, — Tenn. —, 410 S. W. 2d 881 (1966), rehearing denied, — Tenn. —, 410 S. W. 2d 885 (1967).

[3] This claim by petitioners is based on the Fourteenth Amendment, and respondent calls our attention to the fact that at trial and on appeal to the Tennessee Supreme Court petitioners pointed only to specific Bill of Rights provisions. The opinion below demonstrates that the Tennessee Supreme Court considered and rejected the contention that the Fourteenth Amendment and the Sixth Amendment, taken together, required that petitioners be given a jury trial. We have frequently held that a party is not barred by failure to cite below the proper constitutional provisions when the lower courts consider the relevant provisions. *E. g., Braniff Airways, Inc.* v. *Nebraska State Bd. of Equalization and Assessment*, 347 U. S. 590, 598–599 (1954); *Gibbs* v. *Burke*, 337 U. S. 773, 779 (1949).

a gun, allegedly discovered during an unconstitutional search, was admitted at trial. Petitioners raised both challenges in their petition for a writ of certiorari, and we granted the writ. 389 U. S. 815 (1967).

In connection with a labor dispute, McMinn County Chancery Court issued, on January 24, 1966, an injunction barring, *inter alia*;

> "inflicting harm or damage upon the persons or property of [respondent Taylor Implement Company's] employees, customers, visitors or any other persons."

On the night of February 25, 1966, a car was seen to drive past the home of Lloyd Duckett, a nonstriking Taylor Implement employee who lived in Monroe County, which adjoins McMinn. Shots were fired from the car at or into the Duckett home. Robert Wayne Ellis, Duckett's son-in-law, was standing in the front yard with another son-in-law, Dale Harris; Ellis fired back at the car with a pistol, and thought his first shot hit the back of the car. Ellis informed Monroe County Sheriff Howard Kirkpatrick by telephone, and soon after, Monroe Deputy Sheriff Lloyd Powers, contacted by Kirkpatrick on his radio and presumably told of the crime, spotted a suspicious car and began following it. The car raced away but was stopped by Athens, Tennessee, policemen, notified by Powers of a speeding car heading for Athens. When Powers reached the stopped car, which contained the three petitioners, he and the Athens policemen took them to McMinn County jail,[4] and parked their car outside the jail. While petitioners were waiting inside the jail, Powers and several Athens policemen searched the car. Under the front seat they found an air rifle. At trial there was testimony that Ellis and Harris had recognized the car from which

[4] The record suggests that petitioners were told they were under arrest for reckless driving.

shots were fired as a two-tone 1960 or 1961 Dodge, that Ellis thought he hit the back of the Dodge with one shot, that the car stopped in Athens was a 1960 Dodge with a fresh bullet hole through the trunk lid, that an air rifle pellet was found the next day outside the Duckett home, and that an air rifle was found under the car's seat.[5] The chancellor noted that the case against petitioners was "premised entirely upon circumstantial evidence" but that nonetheless he had "no trouble at all with the proof which I have heard and I have weighed it in its severest form, that the charges made must be proven beyond a reasonable doubt." The three petitioners were found guilty.

Petitioners' first claim is that the Fourteenth Amendment was violated when their request for trial by jury was denied. We have held today, in *Duncan* v. *Louisiana, ante,* p. —, that the Fourteenth Amendment imposes upon the States the requirement of Article III and the Sixth Amendment that jury trials be available to criminal defendants. We have also held, in *Bloom* v. *Illinois, ante,* p. —, that prosecutions for criminal contempt are within the constitutional guarantee. The *Bloom* and *Duncan* cases, however, have reaffirmed the view that the guarantee of jury trial does not extend to petty crimes. As *Bloom* makes clear, *ante,* at —, criminal contempt has always been thought not to be a crime of the sort that requires jury trial regardless of the penalty authorized. Alleged criminal contemnors must be given jury trial, therefore, unless the legislature has authorized a maximum penalty within the "petty offense" limit or, if the legislature has made no judgment about the maximum penalty that can be imposed, unless the penalty actually imposed is within that limit. This Court has not had occasion to state precisely where the

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[5] The air rifle itself was not introduced. The trial judge treated it as "filed and withdrawn."

line falls between punishments that can be considered "petty" and those that cannot be. From *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966), it is clear that a six-month sentence is short enough to be "petty." That holding is sufficient for resolution of this case. Here the maximum penalty which Tennessee statutes permitted the chancellor to impose was 10 days in jail and a fine of $50. The contempt was therefore a "petty offense," and petitioners had no federal constitutional right to jury trial.

Petitioners next contend that admission at trial, over timely objection, of evidence concerning the discovery of an air rifle under the seat of the car in which they were riding when arrested violated the Fourth and Fourteenth Amendments. The State concedes that the search was without a warrant, and asserts that it was not in violation of the Constitution because "reasonable." While the record is not entirely clear, petitioners appear to have been arrested for reckless driving. Whether or not a car may constitutionally be searched "incident" to arrest for a traffic offense, the search here did not take place until petitioners were in custody inside the courthouse and the car was parked on the street outside. *Preston* v. *United States*, 376 U. S. 364 (1964), holds that under such circumstances a search is "too remote in time or place to [be] incidental to the arrest . . . ." 376 U. S., at 368.

The search in question here is not saved by *Cooper* v. *California*, 386 U. S. 58 (1967), which upheld a warrantless search of a car impounded "as evidence" pursuant to a state statute. The police there were required to seize the car and to keep it until forfeiture proceedings could be completed. In those circumstances, said the Court, "[i]t would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own pro-

tection, to search it." 386 U. S., at 61–62. In the instant case there is no indication that the police had purported to impound or to hold the car, that they were authorized by any state law to do so, or that their search of the car was intended to implement the purposes of such custody. Here the police seem to have parked the car near the courthouse merely as a convenience to the owner, and to have been willing for some friend or relative of McKinney (or McKinney himself if he were soon released from custody) to drive it away. The reasons that made the warrantless search in *Cooper* reasonable thus do not apply to the search here. The Court discussed in *Cooper*, 386 U. S., at 61, the reasons why that case was distinguishable from *Preston*. The case before us is like *Preston* and unlike *Cooper* according to each of the distinguishing tests set forth in the *Cooper* opinion.

Automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office. *Brinegar* v. *United States*, 338 U. S. 160 (1949); *Carroll* v. *United States*, 267 U. S. 132 (1925). The cases so holding have, however, always insisted that the officers conducting the search have "reasonable or probable cause" to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search. The record before us does not contain evidence that Sheriff Kirkpatrick, Deputy Sheriff Powers, or the officers who assisted in the search had reasonable or probable cause to believe that evidence would be found in petitioners' car. Powers had not been told that Harris and Ellis had identified the car from which shots were fired as a 1960 or 1961 Dodge. He testified:

> ". . . All I got is just that it would be an old make model car. Kinda old make model car."

The record also contains no suggestion that Ellis told Sheriff Kirkpatrick, Deputy Sheriff Powers, or any other law enforcement official that he had fired at the Dodge or that he thought he had hit it with one bullet. As far as this record shows, Powers knew only that the car he chased was "an old make model car," that it speeded up when he chased it, and that it contained a fresh bullet hole. The evidence placed upon the record is insufficient to justify a conclusion that McKinney's car was searched with "reasonable or probable cause" to believe the search would be fruitful.

Since the search was not shown to have been based upon sufficient cause, we need not reach the question whether *Carroll* and *Brinegar, supra,* extend to a warrantless search, based upon probable cause, of an automobile which, having been stopped originally on a highway, is parked outside a courthouse.

Because evidence was admitted without a satisfactory showing that it was obtained in compliance with the Fourth and Fourteenth Amendments, the judgment below is reversed and the case is remanded to the Tennessee Supreme Court for disposition not inconsistent with this opinion.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 149.—October Term, 1967.

Wayne Dyke et al., Petitioners, *v.* Taylor Implement Mfg. Co., Inc.	On Writ of Certiorari to the Supreme Court of Tennessee, Eastern Division.

[May 20, 1968.]

Mr. Justice Harlan, whom Mr. Justice Stewart joins, concurring.

I concur in the judgment in this case, and in that part of the Court's opinion dealing with the admission at petitioner's trial of evidence produced by an unlawful search.

SUPREME COURT OF THE UNITED STATES

No. 149.—October Term, 1967.

Wayne Dyke et al., Petitioners, v. Taylor Implement Mfg. Co., Inc. } On Writ of Certiorari to the Supreme Court of Tennessee, Eastern Division.

[May 20, 1968.]

Mr. Justice Black, with whom Mr. Justice Douglas joins, dissenting.

The Court holds in this case, as it said in dictum in *Bloom* v. *Illinois*, No. 52, that persons charged with so-called "petty" crimes are not entitled to trial by jury. I am not as sure as the Court seems to be that this classification should be used to deprive a criminal defendant of a jury trial. See *Green* v. *United States*, 356 U. S. 165, 193–219 (dissenting opinion). The word "petty" has no exact meaning, and until it is given a better definition than that which the Court gives to it today, I do not desire to condemn the right to trial by jury to such an uncertain fate. See *Cheff* v. *Schnackenberg*, 384 U. S. 373, 384–393 (dissenting opinion). My Brother Harlan's dissent in *Duncan* v. *Louisiana*, No. 410, points out that whippings, even where 31 lashes were inflicted, were classified as petty crimes. And the Court here states that six months' punishment is petty. I am loathe to hold whippings or six months' punishment as "petty." And here, where the offense is punishable by a $50 fine and 10 days in jail behind bars, I feel the same way. Even though there be some offenses that are "petty," I would not hold that this offense falls in that category. See *United States* v. *Barnett*, 376 U. S. 681, 727 (dissenting opinion). Since I would reverse and remand this case for a trial by jury, I do not find it necessary to consider the other questions decided by the Court.